S. HRG. 103–474

TRADE AND THE ENVIRONMENT

HEARING

BEFORE THE

SUBCOMMITTEE ON FOREIGN COMMERCE AND TOURISM

OF THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION UNITED STATES SENATE

ONE HUNDRED THIRD CONGRESS

SECOND SESSION

FEBRUARY 3, 1994

Printed for the use of the Committee on Commerce, Science, and Transportation

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TRADE AND THE ENVIRONMENT

THURSDAY, FEBRUARY 3, 1994

U.S. SENATE,
SUBCOMMITTEE ON FOREIGN COMMERCE
AND TOURISM OF THE COMMITTEE ON
COMMERCE, SCIENCE, AND TRANSPORTATION,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:07 a.m., in room SR–253 of the Russell Senate Office Building, Hon. John F. Kerry (chairman of the subcommittee) presiding.

Staff members assigned to this hearing: Troy H. Cribb, professional staff member; and Kevin M. Dempsey, minority professional staff member.

OPENING STATEMENT OF SENATOR KERRY

Senator KERRY. The subcommittee will come to order. Having already done so, I guess that is pretty redundant.

Thank you very much for joining us this morning. I am particularly grateful to Counselor Wirth and to the members of our panel for joining us at this hearing today. What we hope to do is really begin to explore and lay out the issues that we need to be thinking about a great deal more in the Congress and try to assist in creating a strong framework for the integration of very clear trading interests of this country, but equally clear environmental interests not just of this country, but of the world.

This is an area which has really been on separate tracks for too long. The environment has been treated in a certain way and environmentalists have reacted with a certain set of programs, restraints, alarm bells, while trade has moved down a path, up until NAFTA, which was almost exclusively according to a set of rules that have defined trade for 150, 200 years. Perhaps more, but certainly in modern America's time, in that period of time.

And we have grown probably much too accustomed to thinking about trade as trade, and environment as environment, and leaving them on these separate tracks. The problem which some visionaries within both the trade movement and the environmental movement have tried to define is that it is neither wise—and much more importantly, it is not possible to continue on separate tracks. You cannot continue down those two trails, as we are finding increasingly in the clash within objectives.

The tuna-dolphin decision and the interpretation of GATT and article 20 is a raw and basic example of the problem which will only increase as we continue down the road. Why will it only increase? Well, for very simple reasons. You cannot have the popu-

lation of the world triple in the last 100 years and double within the next 60 years, with the enormous resource depletion and ecosystem damage that we have done, without an ultimate confrontation.

You cannot have trade policies that are geared to build homes, extract resources from the earth, continue the process of laying out concrete, or mining or deforesting without an ultimate depletion of finite resources. And we are seeing that already. We have a massive reduction in the forests of the world. Anyone who is studying sustainability will tell you that the current rate is not sustainable.

And so we need to think about how one-quarter of the world's population in China moves into developed status. Can they do it the way they are doing it now in a Kwangtung Province where you have in the total province, which is roughly one-third the size of the United States in population, only four water treatment facilities? Is it possible to continue down that road? I think most people will say "No."

The problem is obviously one that if you have a separate regimen for trade, which heretofore has been called GATT, which suggests that a legitimate environmental interest of a nation, passed by the nation in the laws of the nation, is somehow a restraint of trade or an unfair trade practice or illegal under GATT because it is imposed outside the GATT process, we are not going to be able to protect either interest ultimately.

So, we are at a really interesting, fascinating juncture here in the development of trade rules and in the protection of the interests of the environment. And it is incumbent on us as policymakers to think extremely hard about how we are going to rapidly integrate these interests in regimen that all of us internationally can understand.

To the credit of the most recent efforts to negotiate the playing rules within the GATT framework, a working group, now the international trade working effort, has evolved. It is not sufficient for most people's desires, but at least it is there. In addition to that, the United States, under the Clinton administration, is proceeding to examine what unilateral steps the United States can take through the establishment of certain standards so that we can establish some leverage with respect to other countries. And how we do that clearly within the framework of the international trade rules is going to be one of the topics that we want to try to explore here today.

But the bottom line is this: environmental issues are not going to go away; they are going to get stronger and more compelling. As we have discovered in the Eastern bloc countries of the once-Soviet Empire, practices were engaged in that are unparalleled in their devastating consequences on the face of this planet.

And whether it is in former Czechoslovakia where there is an area where there are powerplants within a 50-mile radius and you can pick up ash in your hand and find no living tree or bush; or whether it is in the fact that in Poland by the year 2000, if they continue without mitigation, they will have no potable drinking water; or whether it is in the problems of the Yellow River in China or the Aral Sea or a host of other areas, or the problems of the oceans that are overly depleted in their fish stocks and overly

polluted, we all have a massive interest in understanding that trade cannot be a robber baron process that simply engages in the continued pillaging of these resources without some sensitivity.

Simultaneously, environmentalists must understand that not every trade issue can be turned into an environmental one, nor should they be. There is a balance. There really is a balance. And one of the great advantages we have going for us is that new technology is coming on line which can help us to marry business interests and environmental interests. We can help developing countries to put new technologies in place and to allow their products to reflect the cost of this so that the world is joining together in an effort that preserves the future.

The Global Legislators for a Balanced Environment, which Al Gore was president of and Senator Wirth, when he was here, greatly participated in with Senator Heinz, will be meeting at the end of this month, here in Washington in the Senate Caucus Room, with representatives from Japan, Russia, and the European Community to talk about this very issue, sustainable development, trade, and the environment. And we will have a delegation from China who have accepted to come, and from Indonesia. And we hope to increasingly reach out to other countries that are at that critical developing stage with massive ability to have serious economic impact, and get them to embrace sound practices.

The bottom line with respect to this hearing is we have asked experts and those responsible for this area to help us define the issues, help us explore what we most need to work at and to understand, to try to create a consensus about in the effort to use the best of the environmental effort with the best of our trading capacity. NAFTA is a significant beginning in doing that. It is the most significant melding to date of trade and environmental interests, and it is a very important building block for future discussions of the working group with respect to our other trade relationships in the world.

So, I want to thank you, Counselor Wirth, for taking time to be here. You have been a tremendous leader in this area, and I am absolutely certain that as your new position becomes more defined, we are going to have an enormous advantage in beginning to press these issues internationally, and hopefully in a much more clear and urgent fashion than they have been in the past. Mr. Chairman, your comments, please.

OPENING STATEMENT OF SENATOR HOLLINGS

Mr. CHAIRMAN. In 1991, a GATT panel ruled as GATT-illegal the provisions of the Marine Mammal Protection Act which ban imports of tuna caught by foreign fishing fleets that kill more dolphin than is permitted under MMPA. I strongly opposed that decision and was joined by 62 of my colleagues in asking the Bush administration to block the GATT report.

We need to take a close look at how the Uruguay Round will affect our domestic environmental, health, and safety laws. Currently, the administration and environmental groups are supporting creation of a Committee on Environment and Trade under the new World Trade Organization. I look forward to reviewing how

this committee would function and what authorities it would possess.

On another front, I asked the administration last year to impose sanctions on Norway following the certification by the Department of Commerce that Norway is violating the International Whaling Commission's moratorium on commercial whaling. Thus far, sanctions have never been imposed under the Pelly amendment. Today's hearing will be very useful in reviewing the criteria to apply in deciding when to use unilateral actions.

Moreover, I hope that we can open a dialog between trade and environmental interests and find some common ground in their agendas. While we should not stranglehold industry with environmental regulations, we should recognize that sound environmental policies should go hand in hand with economic development. This was painfully evident during my trip to Tijuana, Mexico, last year, where I saw industrial sludge flowing down a hillside onto a cattle farm, children playing in the Tijuana River where sewage and industrial waste are dumped, mounds of lead lying exposed in an abandoned battery plant, and hillside after hillside overloaded by the shanty homes built by the maquilla workers amidst a complete lack of infrastructure.

It is fundamentally unfair to saddle our domestic industries with regulation after regulation while expecting them to compete in the global market against countries whose weak standards give them a competitive edge. Today's hearing should provide a good forum from which we can draw ideas for a framework to level the playing field.

I thank our witnesses for being here today, and I look forward to reviewing the testimony. Thank you, Mr. Chairman.

Senator KERRY. Thank you, Mr. Chairman. Senator Mathews.

Senator MATHEWS. Thank you, Mr. Chairman. I think you have very clearly and very succinctly set the tone for the hearing today, and I will not delay things any further by an opening statement. I look forward to hearing the presentation of the panelists and getting the discussion underway.

Senator KERRY. Thank you very much, Senator. Senator Wirth.

STATEMENT OF HON. TIMOTHY E. WIRTH, COUNSELOR, DEPARTMENT OF STATE; ACCOMPANIED BY HON. DAVID A. COLSON, DEPUTY SECRETARY OF STATE FOR OCEANS

Mr. WIRTH. Thank you very much, Mr. Chairman, Senator Mathews. It is terrific to be back here in these very familiar surroundings and to have the opportunity to begin the discussion of this extraordinarily important and as you pointed out, Mr. Chairman, complex issue.

The questions and the challenges about how to harness these twin priorities must be a priority for the administration, and I know a priority for many of you here in the Congress. And we are delighted to have the opportunity to share our preliminary thoughts on this. Today what I would like to do is go through a bit of the history as to how we got here, not dissimilar from the analysis of parallelism that you pointed out, and move from there to a discussion of what we think the principles may be that ought to guide this. We have been working on this for the last 6 months,

and as you and I have discussed, this presents us with an opportunity to pull our thinking together and to lay it out as a preliminary template for us all to discuss and to have our constituencies look at and discuss.

This is by no means a final product. It should not be, either from us or from you. We have a long way to go. It is very important; emerging, as you pointed out, as an increasingly powerful issue around the world. And it has great potential for those of us who are concerned about those two issues of our growing economy and the global environment, and we really must do this right. So, we want to thank you very much for starting us out on this course together.

Let me add also before I get going into the formal part of the testimony, the personal thanks of the State Department and Secretary Christopher for the remarkable role of leadership and conciliation and prodding that you played in the State Department authorization bill. Nobody looked at that with a tremendous relish, and you did it with an enormous amount of patience and a very steady hand, and it was extremely important to us and to the administration in its view of American foreign policy. Without the structures in place in the State Department authorization bill, we would be severely handicapped. And I bring you the thanks of everybody in the Department and special personal thanks from the Secretary of State.

Trade and environmental policy are, of course, very high priorities in all international discussions. Largely separate as you pointed out, Mr. Chairman, but now intersecting very rapidly; coming from very different conceptual models and very different histories.

In the area of trade, the framework for reconciling national priorities with international commerce has been evolving for hundreds of years, from the Portuguese and Spanish adventurers to national trading companies to colonial relationships. The most recent iterations have come in this century, when the wave of early 20th century protectionism and the global depression spurred new post-World War II awareness of the need for greater cooperation, more broadly agreed upon guidelines for international commerce, and increasingly harmonized international financial institutions.

Of most recent note, of course, is the completion of the GATT negotiations, the NAFTA agreement, the establishment of APEC, and the emergence of free trade as a leading economic, political, and foreign policy priority for the United States. In the late 20th century, we advocate the elimination of trade barriers and we advocate the promotion of greater openness in the international trading system. Every day the world becomes a smaller and more interconnected place.

At the same time, during these same 40 years, we have also come to recognize significant global environmental challenges. We in the United States have led the way in establishing a body of law to help protect human health, manage and conserve species, and clean up and protect the environment, recognizing that they underpin our prosperity economically and intellectually.

As in the trade sphere, our appreciation for the global interconnectedness of the environment has grown. Ecosystem management, global climate change, biodiversity, debt for nature, Rio,

Agenda 21, our vocabulary has changed in the environment, as in trade. We have come to recognize that international consensus and joint resolve will best enable a realization of efforts to protect the environment. And this had led to a body of domestic and international environmental rules that rival their trade cousins in complexity. Now these two trends, one emphasizing international agreement and service of our common economic future, the other emphasizing expanded efforts to do more for our common environmental future, have now intersected.

This administration came to office with a commitment to end the false construct that pitted jobs versus the environment. The President and Vice President have promised, instead, to ensure that the two go hand in hand, as they must. Our challenge and our intention is to lead international efforts to link these issues globally, to realize the promise of what we now call sustainable development.

The issues involved are painfully, devilishly complex, raising a broad range of difficult questions. Let me just mention a few of those. First is the issue of jurisdiction. Under what circumstances is it appropriate to use trade measures to protect the environment and conserve natural resources beyond the country's jurisdiction, and the advisability and possibility of agreeing on international standards for international protection? How high do those standards get set?

Third, dispute settlement. How can environmental aspects of dispute settlement be addressed to assure adequate scientific input and other environmental considerations in what are often very, very tough political environments.

Fourth, lifestyle analysis. How can governments oversee environmental implications of a product throughout its lifecycle? How can we ensure that policies are legitimately aimed at an environmental objective and not disguised as trade restrictions? How do labeling, package, and recycling requirements influence trade?

And subsidies and investment patterns. How do subsidies and investment policies affect trade and environmental objectives? And as you and I have discussed so many times, this boils down perhaps to a single question, How do we get the prices right?

Out of such issues arise another set of questions about how to promote sustainable development among nations at differing levels of development. Most basically, developing nations fear that the upward movement of environmental standards will constrain development opportunities. Thus while some progress has been made in developing a common framework for addressing trade and environmental issues among the OECD nations, the gulf between north and south remains wide indeed.

Just as we must erase the false dichotomy between jobs and the environment within our own country, we must work internationally to facilitate both economic development and environmental protection. One of the most interesting and controversial issues confronting the United States and the international community relates to an understanding of the circumstances under which trade measures are appropriate to conserve resources and to protect the environment outside a country's exclusive jurisdiction, and it is on this issue that the administration has been focusing a great deal of its policy attention.

This is where much of the apparent conflict between trade and environment mushrooms toward controversy, and I am delighted to have with me David Colson, who is the Deputy Assistant Secretary in the Department responsible for oceans, but one of the most creative thinkers in looking at many of these intersections. David is really our resident expert and I am very pleased to have him with us today.

Given our trade and environmental objectives, How do we determine when it is appropriate to use trade measures to protect the environment outside the exclusive jurisdiction of the United States? Numerous U.S. laws have demonstrated that trade, particularly access to our $500 billion marketplace, can be an effective tool for global environmental protection and resource conservation.

We have seen some powerful successes in the ban on ivory imports under the African Elephant Conservation Act, the threat of trade measures against nations engaged in driftnet fishing, and the implementation under the Clean Air Act of the Montreal protocol restrictions on trade in ozone-depleting substances. And we should also take pride, despite the controversy surrounding it, in the tuna-dolphin issue in the Marine Mammal Protection Act and the fact of the death of dolphins around the world has declined very sharply.

However, trade measures can also disrupt economic relations among affected countries. For example, one of the issues that most intensified international debate on trade and environment was Mexico's challenge under GATT rules of U.S. embargoes of tuna, the so-called tuna-dolphin issue.

The report of the Mexico Tuna-Dolphin Panel galvanized the attention of the environmental community because it narrowly interpreted the GATT exceptions to disallow the use of trade measures to protect resources outside the exclusive jurisdiction of the state taking the measure, and many believe that the report broadly threatened the longstanding effort by the United States to help the world conserve living species and protect the global commons. That panel report has not been adopted. It has catalyzed vigorous discussion, both within the United States and in other countries, about when trade measures as an appropriate response to concerns about the global environment.

Let me now move to a brief discussion of the framework that we are working on to guide our thinking; the principles that I discussed at the start. This administration's analysis, arrived at, Mr. Chairman, through lengthy discussion between trade and environmental experts and a very broad discussion across the agencies of this administration, reveals that it is, as we all know, not easy to pin down in advance the exact circumstances in which it would be appropriate to use trade measures to protect the global environment.

But we have identified four categories of circumstances where, as a general matter, we believe consideration of trade measures in support of environmental objectives is warranted. And let me list those four, Mr. Chairman. These are really sort of the guts of what we are talking about today, and I think provide the taking-off point or the foundation for future discussions, and I hope that this will

become grist for the mill. And, again, this has been through a very extensive analysis across the administration.

First, when trade measures are required by an international agreement to which we are a party, assuming nondiscriminatory treatment of nonparties.

Second, when the environmental effect of an activity is partially within our jurisdiction, and there is a reasonable scientific basis for our concern.

Third, when a plant or animal species, wherever located, is endangered or threatened, or where a particular practice will likely cause a species to become endangered or threatened, assuming again that there is reasonable scientific basis for our concern.

And fourth, where the effectiveness of a scientifically based international environmental or conservation standard is being diminished, provided the standard is specific enough that the judgment as to whether it has been diminished can be made objectively.

These are four principles which we would suggest could be used in making decisions about where we would consider using various trade measures to enforce environmental goals. These are examples of situations where the consideration of trade measures may be appropriate.

Trade measures are one remedy to achieve various goals, and there are other remedies as well. We would have to decide then whether the implementation of trade measures is appropriate, and that would depend on other factors including whether there are other options other than trade measures, whether there are options among types of trade measures, and an assessment among these various options as to their probable environmental effectiveness and their economic and diplomatic consequences.

For example, it may be that attacking the underlying environmental problem with environmental tools, such as negotiating an international agreement, is the preferred route to solution. Indeed, in general we believe the latter must be a high priority for the international community. Consensus is a wonderful antidote for conflict.

I think we have made a good start in organizing our thinking and grouping principles against which we can test individual cases. But obviously, Mr. Chairman, this is not going to be an easy process. As we move toward multilateral discussions of these issues in various forums, including the post-Uruguay process, we will need to further refine not only our policy but also the international process for resolving these complicated and contentious issues.

We have tried to do that in the GATT through the conclusion of the Uruguay Round of negotiations. The most significant accomplishments of these efforts was the negotiator's decision on December 15 to call for a work program on trade and the environment, and an institutional structure for its execution to be developed by April 15 when ministers of the general agreement's member countries will meet in Marrakech to finalize and adopt the Uruguay Round.

We fully expect this process to lead to the authorization of a standing institutional structure that can carry out the work for the post-Uruguay efforts to reconcile trade and environmental policy, and this has been a very high priority of ours. Mr. Chairman, this

administration has pushed very hard to develop this continuing institutional structure.

We also are working in other international forums, such as the OECD, to develop a set of principles for the development and linkage of trade and environmental policy. Our trade and environmental experts have been leaders in the OECD. But even among that limited and relatively homogenous membership there have been false starts and points of conflict.

It is fair to say that the United States has established itself in these efforts as a driving force for environmental awareness, and we hope that this analytic work will consolidate support among members of the OECD behind our environmental agenda.

We hope, too, that the findings of this work will help persuade less developed countries that the pursuit of sustainable development and greater policy integration is in their best interest, and is not some kind of attempt by the north or the developed world either to take advantage of their resources or to inhibit their development.

In other forums ranging from the United Nations Food and Agricultural Organization to the Commission on International Trade and Endangered Species the United States has purposefully advanced the cause of environmental protection and natural resource conservation in careful balance with the growth of free trade and its benefits. Case by case and forum by forum, we have staked out leadership positions that promote linkage between environmental protection and world trade.

The forces shaping the future for the United States, linking economic renewal with global competition and environmental protection with international cooperation are clear. Our challenge and our opportunity is to embrace change in service of our economic and environmental aspirations.

We will be working closely with environmental organizations in business groups as well as with this committee and others in Congress to determine the best way of moving this process and our policy forward in the post-Uruguay Round. I am confident that we can do so.

This administration is building a solid base from which to conduct these efforts. We look forward to working closely with you to navigate through this historic meeting of trade and environmental priorities for the benefit of our Nation and the world.

Again, Mr. Chairman, thank you for calling his hearing. It was, as I have told you earlier, very helpful to get the administration to pull all of these efforts together and come to this set of preliminary recommendations, and we think this provides a next base for a set of hearings, further discussions, and so on.

Thank you very much.

[The prepared statement of Mr. Wirth follows:]

PREPARED STATEMENT OF HON. TIMOTHY E. WIRTH

Good morning Mr. Chairman and members of the subcommittee. It is good to be back in these familiar surroundings and to join with you in addressing issues familiar to all of our work—the interface between trade and environment policies. Less familiar, I suspect are the questions and challenges emerging about how best the Administration, Congress and the international community can harness these twin priorities in support of sustainable development.

In my testimony today, I would like to explore those questions and discuss briefly some history that has led to the nexus of trade policy and environmental policy, and the current state of international activity. Finally, I want to let you know how this Administration is preparing and engaging these issues.

As this subcommittee is aware, trade and environmental policy have been high priorities in international discussions for some time. Different forces have led to the intersection of these trends.

First, on trade, we have a framework for reconciling national priorities with international commerce that has been evolving for centuries, as the world has grown in population and complexity. In this century, the spur to even greater cooperation and clearer guidelines was the wave of protectionism that characterized the period leading up to the second World War. Recognizing the ill effects of protectionism, the international community established the GATT agreement, a mechanism designed to promote a more open and free trade system capable of generating more jobs and higher living standards throughout the world. Since World War II, we have seen a general thrust through the GATT toward eliminating barriers and promoting greater openness in an international trading system that every day makes the world a smaller and more interconnected place.

During those same 40 years, we have also come to appreciate the significant environmental challenges we face. At home, we in the United States have led the way in establishing a body of law to help protect human health, manage and conserve species, and clean up and protect the environment that underpins our prosperity—economically and intellectually.a As in the trade sphere, our appreciation for the interconnectedness of the environment has grown. Consequently, we have come to recognize that international consensus and joint resolve will best enable the realization of efforts to protect the environment. This has led to the development of a body of domestic and international environmental rules that rival their trade cousins in complexity.

These two trends—one emphasizing international agreement in service of our common economic future, the other emphasizing expanded efforts to do more for our common environmental future—have now intersected. As a result, there is broad agreement that we have to do a better job of rationalizing these two international priorities in the effort to promote global progress and realize sustainable development, the concept championed during the Earth Summit two years ago.

That these two policy spheres impinge on each other is clear. Trade policy can be a powerful determinant of environmental quality by regulating the flow of investments and goods that have environmental consequences. Conversely, environmental policy can have significant impacts on trade, for example, by establishing standards about how goods are produced or by prohibiting the use of certain goods. Trade can serve as both a carrot encouraging environmental action to conserve natural resources, and as a tool for enforcement against those not complying with conservation decisions.

In an ideal world, there would be no inherent conflict between trade and environmental policy. A properly functioning free market—internalizing all market and non-market costs—should guide producer and consumer behavior to maximize economic and environmental welfare. Unhappily, we are only beginning to understand many of the non-market environmental costs as we come to better understand the complexity and fragility of the natural world. Unless and until we can more fully integrate our economic and environmental policymaking—at home and around the world—we will have to participate in, and, I would argue, lead international efforts to reconcile trade and environmental policy.

This Administration came to office with a commitment to end the false construct that pitted jobs versus the environment. The President and Vice President have promised instead to ensure that the two go hand in hand, as they must. Our challenge and our intention is to lead international efforts to link these issues globally to realize the promise of sustainable development.

The issues involved are painfully, devilishly complex, raising difficult questions such as:

- extrajurisdictionality—under what circumstances is it appropriate to use trade measures to protect the environment and conserve natural resources beyond the country's jurisdiction?
- the advisability and possibility of agreeing on international standards for environmental protection
- dispute settlement—how can environmental aspects of dispute settlement be addressed to ensure adequate scientific input and other environmental considerations?
- life-cycle analysis—how can government's oversee environmental implications of a product through-out its life-cycle? how can we ensure policies chosen are legiti-

mately aimed at environmental objectives and not disguised as trade restrictions? how do labelling, packaging and recycling requirements influence trade?

• subsidies and investment patterns—how do subsidies and investment policies affect trade and environmental objectives?

Out of such issues arise another set of questions about how to promote sustainable development among nations at differing levels of development. Most basically, developing nations fear that the upward movement of environmental standards will constrain development opportunities. Thus, while some progress has been made in developing a common framework for addressing trade and environment issues among OECD nations, the gulf between North and South remains wide indeed. Just as we must erase the false dichotomy between jobs and the environment within our own country, we must work internationally to facilitate both economic development and environmental protection.

One of the most interesting—and controversial—issues confronting the U.S. and the international community relates to an understanding of the circumstances under which trade measures are appropriate to conserve resources and to protect the environment outside a country's exclusive jurisdiction. And it is on this issue that the Administration has been focussing a great deal of its policy attention. This is where much of the apparent conflict between trade and environment mushrooms toward controversy.

We have started by laying side by side our trade and environmental objectives.

U.S. global environmental policy objectives include such priorities as protecting biodiversity and endangered or threatened species; protecting the oceans and their resources; protecting the atmosphere; addressing climate change; as well as protecting the environment and resources that are within or partially within U.S. jurisdiction.

U.S. trade policy objectives include, among others, constructing a market-oriented, rules-based system for international trade in goods, services, and investments; increasing market access for U.S. goods and services; and building confidence in the international trading system by promoting policies that conform to obligations under the GATT and other international trade agreements.

Given these objectives, then, how do we determine when it is appropriate to use trade measures to protect the environment outside the exclusive jurisdiction of the United States.

BACKGROUND

Numerous U.S. laws containing trade measures aimed at protecting the environment outside the United States have demonstrated that trade—particularly in our $500 billion marketplace—can be an effective tool for global environmental protection and resource conservation. We have been some powerful successes in the ban on ivory imports under the African Elephant Conservation Act, the threat of trade measures against nations engaged in driftnet fishing, and the implementation under the Clean Air Act of the Montreal Protocol restrictions on trade in ozone-depleting substances.

However, trade measures can also disrupt economic relations among affected countries. For example, one of the issues that most intensified international debate on trade and the environment—and the need for agreed procedures—was Mexico's challenge under GATT rules of U.S. embargoes of tuna under the Marine Mammal Protection Act (MMPA).

When established after World War II, the GATT agreement did not mention the word environment, but it did provide nations with exceptions to GATT provisions for the use of measures to protect human, animal or plant life or health, and to conserve natural resources, provided that the measures are neither arbitrary or unjustifiably discriminatory among States where the same conditions prevail, nor a disguised restriction on trade. Attention to environmental concerns was almost nonexistent in the GATT until the tuna/dolphin case. Since then, there has been considerable discussion of this topic in the GATT including the revitalization of the GATT trade and environment committee.

The report of the Mexico tuna/dolphin panel galvanized the attention of the environmental community because it narrowly interpreted the GATT exceptions to disallow the use of trade measures to protect resources outside the exclusive jurisdiction of the State taking the measure. They fear that this panel report would throw into question our longstanding efforts in the United States to help the world conserve living species and protect the global commons.

While this panel report has not been adopted, it has catalyzed vigorous discussion, both within the U.S. and in other countries, about when trade measures are an ap-

propriate response to concerns about the global environment, including conservation.

OUR THINKING

This Administration is devoting a great deal of attention to addressing the issue of the appropriate role of trade measures in protecting the global environment. (It should be noted that product standards such as sanitary and phytosanitary standards are not the subject of this analysis.) Our analysis to date reveals that it is not easy to pin down in advance the exact circumstances in which it would be appropriate to use trade measures to protect the global environment.

Let me touch briefly on the framework we are working on as a guide to our thinking. As a general matter, we have identified four categories of circumstances where we believe consideration of trade measures in support of environmental objectives is warranted:

1) when trade measures are required by an international environmental agreement to which we are a party, assuming non-discriminatory treatment of non-parties;

2) when the environmental effect of an activity is partially within our jurisdiction, and there is a reasonable scientific basis for our concern;

3) when a plant or animal species—wherever located—is endangered or threatened, or where a particular practice will likely cause a species to become endangered or threatened, assuming there is reasonable scientific basis for our concern; and

4) where the effectiveness of a scientifically-based international environmental or conservation standard is being diminished, provided the standard is specific enough that the judgment as to whether it has been "diminished" can be made objectively.

Let me stress that these are examples of situations where the consideration of trade measures may be appropriate; whether the implementation of trade measures is appropriate will depend on other factors as well, including whether there are any options other than trade measures, whether there are options among types of trade measures, and an assessment among these various options as to, for example, their probable environmental effectiveness and their economic and diplomatic consequences. For example, it may be that the use of a trade measure in a particular case would be counter-productive from an environmental point of view. Or it may be that attacking the underlying environmental problem with environmental tools—such as negotiating an international agreement—is the preferred route to solution. And indeed, in general, we believe the latter must be a high priority for the international community. Consensus is a wonderful antidote for conflict.

OTHER APPROACHES

In analyzing circumstances that warrant at least consideration of trade measures, we have also examined various approaches that have been suggested by others. Let me comment on them briefly.

First, at one end of the spectrum is the direction taken by the GATT tuna/dolphin panel. This approach, which could be interpreted to permit only those trade measures directed at the protection of human health and the environment within a country's jurisdiction, struck us as wholly unacceptable. It would not cover those cases, for example, where protection of the global commons, conservation of living marine resources on the high seas, or preservation of endangered species is at issue. Of interest to all of us is that such an approach could all into question the application of some U.S. environmental laws with trade provisions. Finally, it would not even appear to protect cases where all parties to an environmental agreement agree that trade measures are an appropriate response to a particular environmental concern.

A second approach endorses the thrust of the tuna/dolphin decision, but would permit trade measures to protect the global environment where an international environmental agreement specifically requires the use of trade measures. While we believe that trade measures under agreements such as CITES and the Montreal Ozone Protocol must be permitted, this approach by itself is too limited. Trade measures in international environmental agreements have played and will continue to play an important role, but there are cases where no international agreement exists for which trade measures may be warranted. Further, given that this approach requires international agreement not only on the environmental standard in question but also on the use of trade measures as the response to non-implementation of that standard, it appears to place too high a burden on the State seeking to protect the environment.

Third, perhaps at the other end of the spectrum is the view that trade measures are almost always an appropriate tool for promoting global environmental protec-

tion. Some justify such an approach philosophically by arguing that global environmental protection is an end we seek, whereas the international trading system is simply a means of improving living standards. Means, it is thus argued, are justified by the ends. Certainly, this view reflects some of the impatience that exists with respect to the pace of international environmental initiatives. While this Administration shares this impatience, we would have significant economic concerns with an approach that establishes no groundrules at all on the use of trade measures. As I said before, we are interested in a rules-based approach that will allow U.S. goods and services to compete freely in the international market place. Moreover, a policy of unrestricted use of trade measures is a strategy for conflict that only will further entrench those who fear that trade measures for environmental purposes are really disguised protectionist measures, as opposed to sound tools for common progress.

THE INTERNATIONAL PROCESS

It is clear, Mr. Chairman, that this is not going to be an easy process. As we move toward multilateral discussion of these issues in various fora, including the post-Uruguay process, we will need to further refine not only our policy, but also the international process for resolving these complicated and contentious issues.

We have tried to do that in the GATT through the conclusion of the Uruguay Round of negotiations. The most significant accomplishment of these efforts was the negotiators' decision on December 15, 1993 to call for a work program on trade and the environment and an institutional structure for its execution, to be developed by April 15, when Ministers of the General Agreement's member countries will meet in Marrakech, Morocco, to finalize and adopt the Uruguay Round text. We fully expect this process to lead to GATT authorization of a standing institutional structure that can carry out the work program for post-Uruguay efforts to reconcile trade and environmental policy.

On top of these institutional advances, our negotiators were able to win agreement for several important environmental provisions that, while not perfect, will make the GATT and the World Trade Organization more responsive to environmental protection. In the text on Sanitary and Phytosanitary measures, for example, we gained language changes designed to safeguard against use of unjustified measures to keep U.S. exports out of a country, while modifying concepts such as the "least restrictive to trade" qualification on phytosanitary measures, which by their lack of clarity might have been used to undermine American environmental standards. We were also successful in increasing the transparency of the trade dispute settlement process.

We should be proud that our negotiators managed to obtain these significant changes at a late stage of the negotiations against significant resistance. We now need to secure agreement with our trading partners on the formal creation of a Standing World Trade Organization Committee on Trade and the Environment.

We also need to work together to build on our efforts in other international fora—such as the OECD, which has developed a set of principles for the development and linkage of trade and environmental policy. Our trade and environmental experts—from USTR, EPA, State, Commerce, and elsewhere—have been leaders in the OECD. But, even among that limited and relatively homogeneous membership, there have been false starts and points of conflict. In June 1993 the Joint Experts Committee produced procedural guidelines which were adopted by the OECD, discussing transparency in trade and environment policies, trade and environmental reviews and examinations, international environmental cooperation, and dispute settlement. It simultaneously established a work program, to study issues including methodologies for conducting trade and environmental reviews and examinations, processes and production methods, the use of trade measures for environmental purposes, the harmonization of environmental standards, economic instruments and environmental subsidies, and dispute settlement.

It is fair to say that the United States has established itself in these efforts as a driving force for environmental awareness, and we hope that this analytical work will consolidate support among members of the OECD behind our environmental agenda. We hope, too, that the findings of this work will help persuade less developed countries that the pursuit of sustainable development, and greater policy integration, is in their best interest.

In other fora, ranging from the United Nations' Food and Agricultural Organization, to the Commission on International Trade in Endangered Species, the United States has purposefully advanced the cause of environmental protection and natural resource conservation, in careful balance with the growth of free trade and its bene-

fits. Case by case and forum by forum, we have staked out leadership positions that promote linkage between environmental protection and world trade.

Let me close, Mr. Chairman, by pointing to the most impressive guidepost we have for our work in the future—the NAFTA agreement approved by Congress last fall.

One of the reasons this Administration supported so strongly the NAFTA and its side agreements was for its groundbreaking, historic effort to reconcile trade and environmental policy. In this regard, the NAFTA agreement and its supplemental agreements were both admirable and inevitable.

The economic case for NAFTA was much discussed and the promise of the agreement well understood by just about all who have looked carefully at the details. Less familiar were the environmental implications of this treaty, which is a historic precedent for the world.

Most important, the NAFTA embraced the emerging consensus that the international trading system must be better harnessed with our priority for local, national, regional and global environmental protection. For the first time ever, one of the objectives of a major trade agreement is to promote sustainable development. To achieve this aim:

- The NAFTA sets rules for investment that prevent the lowering of standards as a lure to investors and instead permit the imposition of environmental safeguards to govern investment activity.
- The NAFTA explicitly gives precedence to trade obligations in specified international environmental agreements—like the Montreal Protocol on Ozone Depleting Substances;
- And importantly, the NAFTA preserves the integrity of U.S. environmental, health and safety standards at all levels of government. This is a bottom line for the United States as we approach future discussions.
- The environmental side agreement establishes groundbreaking commitments and obligations for the enforcement of environmental laws, as well as innovative institutional mechanisms

The forces shaping the future for the United States—linking economic renewal with global competition and environmental protection with international cooperation—are clear. Our challenge, and our opportunity is to embrace change in service of our economic and environmental aspirations. We will be working closely with environmental organizations and business groups, as well as with this Committee and others in Congress, to determine the best way of moving this process and our policy forward in the post-Uruguay Round period.

I am confident that we can do so. This Administration is building a solid base from which to conduct these efforts. We look forward to working closely with you to navigate through this historic meeting of trade and environmental priorities for the benefit of our nation and the world.

Senator KERRY. Thank you very much for that good outline of both the issues and the current thinking of the administration. I think it is a very hopeful place to begin.

What I would like to do is explore a number of different areas here and really just sort of have a dialog about this a little bit.

Before turning to some of the substance of it, can you give us a sense of timetables with respect to the work group of the administration and some the initiatives you may be undertaking?

Mr. WIRTH. Well, we are looking at establishment by April 15, and that really becomes goal No. 1. I think it is fair to say that this working group on trade and the environment set up in the post-Uruguay world would be established.

As we establish that, then people are going to say, "Well, what do we do? What are we going to work on? What are we going to talk about? What are we going to discuss?" And I think starting with today and this statement by the administration laying out these four organizing principles, it becomes the basic starting point.

So, I think between now and April 15 we will consolidate a good deal of discussion and reaction, and be prepared going in to say that we are very firm in this.

Senator KERRY. You partook in the effort to examine some of these issues in Rio, which was the world's largest gathering of leaders in history, and an opportunity which I think you and I and a lot of people felt was lost for raising some of these issues cogently by our Nation as an environmental leader.

Nevertheless, out of that has come the sustainable development effort that is going on, the continued effort of the United Nations on this subject.

I wonder if the administration is contemplating or if you believe that it might be important for us to specifically try to target as a precondition to arriving at an ability to really implement much of the Rio suggestions—an international agreement as to what the playing rules are and what the definitions are.

Is there a view in the administration of trying to look toward such a gathering again within a specific timeframe, and an effort to try to reach those definitions, and force the process a little bit?

Mr. WIRTH. Again, there are two other streams coming into this as you know, Mr. Chairman. First is the Commission on Sustainable Development, which is the product of Rio. And that had its first meeting in New York last June, has a variety of subcommittees, and has broken out to take a series of challenges year after year after year. There are 52 nations who are members of that commission.

Parallel to that is our own President's Council on Sustainable Development, which has been named by President Clinton. It was named late last summer. That had its third meeting in Seattle about 2 weeks ago, and they are developing our own national agenda for recommendations to the President about our own national course on sustainable development. That is one set of courses coming out of Rio.

A second is taking form as we move toward issues of population and sustainable development with the Cairo conference, and you will be chairing the Senate observer group, I understand, to Cairo where we have another set of issues. You mentioned the population nexus in your opening comments.

And a third is establishing this mechanism that I mentioned by April 15. Then we would put on the table what we believe the organizing discussions ought to be, and then you start a discussion. If that becomes an agreed-upon template, then you have another series of discussions of such issues as remedy, process, and transparency, how are our international trade institutions going to work, how transparent at they going to be—that is one of the issues, for example, surrounding the International Whaling Commission. What kind of dispute settlement commissions get developed?

There are those three tracks at least that will be engaged in this year.

Senator KERRY. Turning to some of the specific issues raised here, I would like to just look for a moment, for instance, at the tuna-dolphin issue.

Mexico, after the finding in their favor, has essentially backed off implementation. Is that backing off in your judgment—maybe Mr. Colson wants to answer this—a reflection of the revisiting of the substance of the issues raised or was it merely the politics of NAFTA and sort of a temporary avoidance of confrontation?

Is there any change in the dynamic with respect to how we can unilaterally endeavor to protect a resource that we deem under our law in need of protection?

And the second part of the question is, if not, how do we deal with this question of one nation's judgment about what is another country's means of production versus our judgment, particularly with an offshore living resource, about the standard means of production in global commons? How do we then assert our interests?

Mr. WIRTH. Mr. Chairman, if I might answer first in a general way, and then ask David Colson to respond as well.

There are two parts of an answer to that. The second part, the second question you ask is, How do you decide when you can take this kind of unilateral action beyond your own jurisdiction? And that is what the four principles are about. Does action fit into one of those, and can we get agreement that those would be four criteria for making a move beyond our jurisdiction.

Senator KERRY. Is it your view that those criteria have to be accepted by other countries or that we would state them unilaterally?

Mr. WIRTH. No, we would state those. We would state those after a long process, but we also are very aware of the fact, Mr. Chairman, that as we come up with this set of principles that other countries are going to be watching us very, very closely. And the chances are that if we do it right we are going to find that these are the kinds of principles that become ones that get accepted by other countries as well.

So, this process is not only important to us. It is being watched very, very closely by the international community.

Assuming you have these principles and you know when you are going to apply some kind of action, say, like a tuna-dolphin issue, then the question becomes what are the remedies? If you decide that action ought to be taken, then what are the remedies that are out there?

One of the remedies is, of course, some kind of trade action, but there are other remedies as well. And that's where we are with Mexico today. We've decided jointly to back away from the confrontation and the GATT panel with the Mexican Government, and instead to negotiate with the Mexicans.

And one can see despite the complexity of the tuna-dolphin issue, that in fact the goal that we originally had, which was to save dolphin and to separate out fishing technologies and fishing techniques, has been largely achieved. The numbers of dolphin killed have dropped precipitously, and the numbers of countries fishing in a different way has risen very dramatically.

So, that is an example of where we started with one remedy, and negotiated, and ended up in a negotiated sense working with the Mexicans and accomplishing a great deal of our goal.

Ambassador COLSON. Mr. Chairman, your first question was, Have the Mexicans had a change of heart after pressing forward with the GATT case? And was it NAFTA that really caused them to back away?

I cannot answer that question specifically, but I will say that I think that if you speak to people in the Mexican Government now, they would be expecting the United States to continue to look at what Mexico would regard as our obligations pursuant to GATT,

and to try to find a solution to the dispute that has arisen out of the tuna-dolphin problem.

I think the administration, in looking at this question, has had a focus on both the need for international agreement in these settings and to seek international agreement in these settings without giving up the right to act unilaterally. And also, the need to focus hard on science as well as the need to focus hard on what specific environmental objectives are we trying to achieve, and what are the environmental costs of what we are doing.

And I think the tuna-dolphin issue will be one that we have 20 years of experience with. It has been around a long time, and you know the issue perhaps better than I. But we have had a long evolution in our country and in the Congress looking at the issue. We have largely achieved what we set out to do. There were less than 4,000 dolphins killed in this fishery last year.

We are at a point that perhaps no one ever thought could be achieved in the way that the fishery is conducted. And I think most observers would say that probably that fishery now is a cleaner fishery environmentally than the options that are being spoken of, moving this fishery into use of other kinds of gear and using other sorts of fishing techniques; that the fishery on dolphins is an environmentally responsible fishery. And it is hard to make a case that there is a scientific concern associated with the dolphins in that particular setting.

So, it is something that we would have to look at carefully in light of the principles that the administration has come up with. It is an issue that the scientifically based regime that has been developed could be used. We could enforce that regime under the administration's proposal, but in fact we're really asking—presently our law is set up to take us beyond that present situation.

Senator KERRY. Now, looking at that example as well as at other examples, it underscores the fact that the word "protection" has two different interests and two different meanings, if not more. But protection for the environmental movement is good, and protection for trade is bad.

And a step such as we have taken heretofore, as the GATT ruling underscores, has been easily translatable as either an unfair indirect subsidy or restraint on trade.

Therefore, to avoid that conflict of interpretation and definition which is, after all, the essence of this conflict, do you in effecting the principles that you have articulated have to try to negotiate these through the multilateral forums, negotiate them through a bilateral forum, or merely assert them and implement them, and run the risk of adverse GATT decisions?

Mr. WIRTH. You would take it on a case-by-case basis. The world would know and we would know when we——

Senator KERRY. So, you would promulgate them?

Mr. WIRTH [continuing]. When we would move. You would promulgate the four principles and say, these are the ways in which we are going to look at the nexus between trade and the environment, and when we would start to move to protect the environment.

For example, principle 1, is it required by an international environmental agreement like the Montreal Protocol or like CITES?

Principle No. 2—it is outside of our jurisdiction but it impacts us. Clean air, for example, is outside of our jurisdiction but it flows into the United States, or a river that is outside of our jurisdiction but it flows into the United States. That would be a second area where we would say, we are going to engage.

Third, it threatens an endangered species. And fourth, there is generally—and that would be, say, on African elephants or rhino and tiger, the most familiar case.

And finally, that there is an international standard, and that international standard would be, say, driftnet fishing; that internationally we agreed, all the nations of the world came together and agreed that we were no longer going to condone driftnet fishing. But there was no remedy in that agreement, so the United States put the pressure on saying, we have all agreed to that and we are going to take the next step.

Having said that those are the four ways that would trigger our engagement, then the question is, What engagement would be triggered? What would the remedy be? And that goes directly to your question, and that would differ from one case to another.

Senator KERRY. What would the relationship be of these four principles, for instance, all of which, one could make an argument, are involved with respect to Norway's decision on whaling, and the application of the Pelly amendment or the Pelly amendment sanctions?

Ambassador COLSON. The President has made very clear that the United States will oppose commercial whaling. That was in his statement to the Congress last October, and I certainly do not see us changing that position within the administration.

There is a second question, though, and that is, When would it be appropriate for the President, using the discretion given to him in the Pelly amendment, to impose trade sanctions in any particular situation, whether it is Norway's whaling or whether it might be some other country that would consider the engagement in some kind of whaling activity? I think in our thinking we would have to look at that fourth standard, and the real question would be the balance between the question of whether the moratorium that has been proposed by the IWC is really scientifically based, or whether some other action, some other action taken by another country, is really scientifically based and what kind of transparency has been given to that action.

The President did say, in his report to Congress, that he believed that Norway's resumption of commercial whaling justified the imposition of trade sanctions under the Pelly amendment, but that he preferred for the time being to defer the imposition of those sanctions until there had been an opportunity to engage Norway in a constructive discussion. And the President did say that the issue really was the absence of a credible, agreed management and monitoring regime that would ensure that whaling is kept within a science-based limit.

So, those discussions we do continue to engage the Norwegian Government. We do continue to encourage them to stop any plans they have for engaging in commercial whaling in 1994. But the question of whether or not the President would choose to impose trade sanctions remains an open issue at this time.

Senator KERRY. The standard of scientific evidence is obviously a critical one. Your second principle says "when there is a reasonable scientific basis for our concern." Have you arrived at a conclusion whether that is going to be our reasonable certainty, or is this an internationally accepted standard of scientific certainty?

Mr. WIRTH. As you know, we are just debating. The International Whaling Commission, we have asked—is in the process of examining this.

Senator KERRY. Not just with respect to whaling, but in general. These are four principles you want to apply.

Mr. WIRTH. We would have to be comfortable with that. We would not delegate or defer that to somebody else.

I am sorry. I was thinking we were talking very specifically about the whaling situation.

We would have to be comfortable. The United States would be comfortable with the fact that this was scientifically based. And we would also want to be able to say to the world that what we believe is based on scientific evidence is very clear.

Senator KERRY. What were you going to say with respect to Pelly and whaling?

Mr. WIRTH. Well, on the whaling situation, we have asked first to have the International Whaling Commission to come up with that scientifically based analysis of where we are with whaling, and if, in fact, the International Whaling Commission has made a determination, if that is then satisfactory to us.

Senator KERRY. One of the other interesting issues that I want to explore with you a little bit, before I turn to Senator Danforth, is the whole question of the "polluter pays principle," which has been accepted both at Rio and in the other international recent convocations. Obviously, the question of how we value the real value of the products coming out of some of these developing countries is going to be a very interesting measure of the real cost of those products, and therefore of the price, if you will, of living up to whatever standards we come to agreement on internationally on the environment.

So, I think that is one of the areas that you need to explore to try to work out what the internationally accepted approach is going to be, because without that understanding it is awful hard to ask countries to—well, it is going to be hard to get. It is not hard to ask them, it is hard to get them to agree. But let me come back to that, and first turn to Senator Danforth.

OPENING STATEMENT OF SENATOR DANFORTH

Senator DANFORTH. Right now, it is my understanding that if somebody tried to import into the United States an endangered species or a product from an endangered species, that is now prohibited by law. Is that right? You cannot, for example, import elephant tusks. I am not sure, but I am just asking.

Mr. WIRTH. As a general proposition, that is the case, yes.

Senator DANFORTH. But your proposal is to go further than that.

Mr. WIRTH. And that is what they law requires us to do. If, in fact, actions by other countries either further endanger that species or it may take a species that is on the verge of endangerment over the line to endangerment, then we are asked to make a determina-

tion. And then the President can bring sanctions against that country or take other actions. And the tiger and rhino is the central case right now.

Senator DANFORTH. All right. Let us say that somebody was in the business of selling tigers, and we now keep those out. You cannot just import a tiger into the United States today.

Mr. WIRTH. That is true. Tiger parts and rhino parts is the current issue.

Senator DANFORTH. Right.

Mr. WIRTH. You cannot import a tiger part or a rhino part into the United States, either.

Senator DANFORTH. Now, let us take rhinos, because I think I understand the rhino-part thing. Let us say we now have that pretty well covered, as far as importing rhino parts. We have got the Customs Service alerted to this problem. But in fact, there is not much of a market within the United States for rhino parts. But I understand that in certain parts of the world there is.

Mr. WIRTH. That is right. Rhino horn is considered an aphrodisiac in many parts of Asia, and that has created a demand for that rhino part. And rhino part trafficking occurs.

Senator DANFORTH. OK, let us say that these rhinos are in Kenya, and somebody is poaching rhinos or selling rhinos and exporting them to China. Now, how does the present state of affairs deal with that, and how do you propose dealing with that?

Mr. WIRTH. Well, that would fall under principle No. 3, that there is an existing international agreement that this is an endangered species, and that the United States would therefore, in compliance with that—we believe the scientific evidence is all there—we would then certify that in this case Taiwan and China were trafficking, or people in that country were trafficking in rhino parts. That was certified by the Secretary of the Interior, who has that responsibility to the President, and the President then says, what actions ought to be taken?

At this time, we decided that instead of taking trade actions in this situation, we wanted to take administrative and technical assistance actions. For example, in dealing with the Government of Taiwan, the question was, How would you go about identifying and enforcing the trafficking in rhino parts?

So, we had a team that went, in fact, to Taiwan, as I remember, Taiwan, China, and Korea, on both the rhino parts and tiger parts issue, to provide technical assistance to those governments in terms of monitoring this.

Senator DANFORTH. Right. I understand that you declined to use trade sanctions.

Mr. WIRTH. That is right.

Senator DANFORTH. My interest is the potential use of trade sanctions, not the withholding from use of the trade sanctions. But heretofore, have we used trade sanctions against a country with respect to rhino parts?

Mr. WIRTH. I do not think so.

Senator DANFORTH. But you are suggesting that that should be a possibility.

Mr. WIRTH. We certainly could do that. That authority, the President already has, and the President could do that.

Senator DANFORTH. I know. But my understanding is that there is some departure from the status quo that is being considered. Am I right or wrong?

Mr. WIRTH. I think that probably the principle that we are talking about, No. 3, is the firmest—before you came in, Senator Danforth, just let me explain, what we were trying to do was to sort through all of the discussions and what would be the rationale for the United States to consider moving to trade sanctions or to other remedies, what would cause us to get to there.

Senator DANFORTH. Just let me see if I can understand this. All I want to consider is trade sanctions, just for the purpose of our discussions, so I can understand it.

Mr. WIRTH. We have not departed.

Senator DANFORTH. Trade sanctions, in this case, means more than keeping rhino horns out of the United States. It means the United States deciding to use sanctions against, let us say, Taiwan. As I understand this proposal, it is if Taiwan is importing rhino parts from, or the People's Republic of China is importing rhino parts from East Africa, then the United States would be able to restrict importation into the United States from the People's Republic of China of, let us say, garments.

Mr. WIRTH. Ultimately, that could be a sanction that could be taken.

Senator DANFORTH. Can I just ask you, this would be a new policy; would it not?

Mr. WIRTH. No, this is in existing law, and we could do that now without having any of these discussions.

Senator DANFORTH. Right.

Mr. WIRTH. If Taiwan was certified and if we determined that trade sanctions was the best way to help to conserve that species.

Senator DANFORTH. Right.

Mr. WIRTH. The goal is to preserve that endangered species.

Senator DANFORTH. All I want to know is when we are going to use trade sanctions. Have we in the past used general trade sanctions, meaning trade sanctions other than on the restricted product, itself? Have we in the past used general trade sanctions for the purpose of enforcing an environmental purpose?

Ambassador COLSON. Senator, I think I could—at least from my experience there are three that by law we are required to use trade sanctions. The tuna/dolphin issue is one where if a country does not meet a particular standard, that country cannot export tuna products to the United States.

Senator DANFORTH. But that is the specific product.

Ambassador COLSON. We are protecting dolphins, though.

Senator DANFORTH. It is the product that arises out of this specific complaint.

Ambassador COLSON. A similar one is the shrimp/turtle problem which goes to your same point. One that goes beyond that, though, however, would be the driftnet situation, where not only would we require that no fish products from an offending country enter the United States, whether or not it was connected with the driftnet fishing activity, but all sports fish equipment would be embargoed. So, our laws already take us in this direction.

I think what we are doing is outlining a set of principles that in some ways takes us beyond some of the places we have been. But it also constrains us a bit.

Senator DANFORTH. That is what I would like to find out, because it is my understanding that this hearing is about something that is new. You would concede that?

Mr. WIRTH. The hearing is an attempt—Senator Kerry asked if in this hearing we would begin the discussion of the nexus of trade issues and environmental issues. They have gone like this: We know that these issues are coming. What are the principles that should organize the thinking and actions of the United States? So that is where we are as of today in laying out what are the four areas that we believe are the principles that would trigger—potentially trigger—activities of some kind by the administration.

Senator DANFORTH. So, what you are saying, as I understand it, is that one of the principles is that the United States could use general trade sanctions to enforce endangered species protection.

Mr. WIRTH. What we have said today—that is one of the results. What we have said today is there are four principles. And then the next step is, after you accept those, then what remedies do you decide to undertake. And one of those remedies could be trade. Other remedies are technical assistance. They are jawboning. They are negotiation and all that sort.

Senator DANFORTH. I understand that. It is fine to jawbone. But what I am asking about is trade. That is all I am interested in.

Mr. WIRTH. That is one of the remedies.

Senator DANFORTH. That is all I am interested in, is trade. And what I would like to know is is it now the policy of this administration that if the United States does not like some environmental policy and it meets these criteria, these four criteria, then the United States has the option unilaterally of imposing trade sanctions.

Mr. WIRTH. That could be one of—trade sanctions could be one of the remedies. But we are not there yet. What we are attempting to do, Senator Danforth, is to, leading up to the establishment by April 15 of this international group on trade and the environment, to try to lay out what we think would be organizing principles to guide everybody's thinking. And perhaps we will be successful in getting broad agreement on that.

Between here and there, we are operating, obviously, under U.S. law. We are trying to take this the next step on this thorny complex of issues that are out there. How do we organize our thinking? And we were sharing with you in this hearing the beginnings of the first determinations made by the administration.

Senator DANFORTH. Is it your thinking that the United States should be able to use general trade sanctions as opposed to sanctions against the specific product in order to enforce the four principles that are here enumerated?

Mr. WIRTH. In some places the Congress tells us that we must. In other cases, we would, if we had the authorization to do it and if it were deemed to be that was an appropriate remedy, then the answer to that would be yes. But I would think that would be way down the line in terms of general remedies, as it is in the areas where we are asked by or told by the Congress that we do have that authority and should use it.

Senator DANFORTH. Let me ask you this: Does the administration intend to ask for fast track authority for the purpose of the so-called blue-green round of trade negotiations, which fast track authority would be incorporated in the enabling legislation of the GATT agreement.

Mr. WIRTH. We are not there yet. We have a long way to go between here and there, and I think that there is a lot of sort of fast—it sounds good if you say it fast enough—discussion about a blue-green round. Rather, and more importantly, we hope that this process is established and that we establish a forum that has, in fact, a set of remedies, and we can get the world to work on these issues and discuss these issues.

Senator DANFORTH. Tim, let me just tell you what concerns me about this blue-green round thing, OK? We create fast track authority. Then the administration—and we are seeing this now with the GATT agreement—they proceed to negotiate something. Then they tell us, well, they have negotiated an international agreement. And, of course, once you have negotiated it it cannot be reopened. And then Congress has to approve it without amendment. So, what is being discussed, even in early stages, is very important.

Mr. WIRTH. I understand.

Senator DANFORTH. We have to be alert around here to what is going on. Before you know it we are told we have taken but a tiny step on the way to this very long journey, but the journey is inexorable. We must follow through the conclusion.

Senator KERRY. That is why we are having this hearing. This is a sign of alertness.

Senator DANFORTH. That is right. So, I want to know whether the administration would like to have a multilateral agreement which ties environmental protection to trade sanctions.

Mr. WIRTH. I know of no plan at this point to come to the Congress and ask for such legislation or such authority.

Senator DANFORTH. Is it being discussed?

Mr. WIRTH. What is being discussed, and our priority and our plan, is to attempt to develop—we are pushing very hard this trade and environment group to be established by April 15. That is where we are putting our greatest emphasis.

Senator KERRY. Let me, if I can, intercede here just for a minute, because this is good, and this is what we want to have happen here, and it will help us frame the issues effectively, which is what we want to do.

It is my sense—the arguments you are making, incidentally, are very familiar. When the Republicans were in the White House, there were a lot of Democrats saying, "We are worried about what you are going to negotiate." Now I hear it on the other side. They are very worried about fast track. It has suddenly switched sides, in terms of who is for it and against it.

But the larger issue is well focused on by the Senator from Missouri, and I know where you are coming from. I think I know where you are coming from. I think the Senator has a fundamental opposition to the notion of linking any kind of unilaterally arrived at trade sanction, I think, to almost any environmental interest, unless there is an international regimen where we have all agreed on it.

What I think the Senator is suggesting is that if the administration is contemplating setting up a structure where it could take a unilateral trade sanction against somebody for some environmental violation, that they would be in violation of GATT or other fundamental rules of trade. Is that correct?

Senator DANFORTH. Well, that is part of my concern, but my concern also extends to multilateral agreements, and bilateral. I was very concerned about the side agreements for NAFTA.

Senator KERRY. Well, let me ask the Senator, then, because this is where we really get to the nub of this——

Senator DANFORTH. I am not a witness, but I will be happy to——

Senator KERRY. But I am trying to—because I think then you and I can help frame a better question to Tim and to the administration.

Senator DANFORTH. Right.

Senator KERRY. One of the questions I was going to begin to come to is, is there a situation that you can contemplate where there is an environmental interest significant enough where the absence of attention to it by some other country would predicate that we perhaps take a trade measure because that is the best leverage we have to get them to behave differently, and particularly when it is the trade policy itself that is encouraging the very behavior that you want to proscribe? Is there that kind of interest?

Senator DANFORTH. It is, I guess, hard for me to give you an answer which is absolutely all-encompassing, but I can give you a mindset which is very strongly held, and it is this. I believe that the use of trade sanctions to accomplish more than market opening—in other words, when it becomes delinked from trade itself—is a generally ineffective thing to do, and very damaging as a matter of policy.

I generally view with alarm, for example, the use of trade sanctions as an automatic response to foreign policy issues, and I am very concerned about the linking of trade sanctions to environmental concerns, whether they be multilateral or unilateral.

Let us take multilateral first. If they are multilateral, the problem is first that we have established a second track for pursuing environmental complaints, so that right now, if there is an environmental complaint within the United States, there are laws that can be used to pursue that complaint. Well, if you have a multilateral system, you have a second track to do that. You take your complaint not only to the EPA, you take the complaint to some panel, some multinational panel that has been established, and you send inspectors around. This was the question that was debated with respect to NAFTA. How effective was it going to be?

If it is unilateral, you have a situation where everybody is going to be doing this to everybody else in the name of the environment, at least nominally, but with the practical implication that the environment becomes a make-weight for protectionism, so that somebody who is complaining about, let us say, the importation of sweaters from the People's Republic of China uses the rhino horn concern as the rationale for pursuing that cause.

I think what is involved here is the closing down of a marketplace. I think that that is what is involved—the closing down of the

marketplace. I think that what is involved in a blue-green round is the effort to create multinational trade agreements for the purpose, not of opening markets, which has been the rationale for the Tokyo Round, the rationale for the Uruguay Round, but instead a new round of trade agreements which would have the effect of closing markets rather than opening markets. I think that it is a very, very dangerous thing to do.

Senator KERRY. Let me ask, Senator Wirth, if you would respond to that. I have some thoughts about it, but I think it is a good question. Can you engage in these activities without shutting markets? Is there a way to guarantee it is an opening process while simultaneously defining the terms sufficiently, so that you do not wind up with the misinterpretation Senator Danforth has addressed?

Mr. WIRTH. Well, first of all, Senator Danforth, while we appreciate your concerns, we would disagree very sharply with your—what I think may be your assumption as to what this is all about, to shut down markets. In the first part of my testimony, we were very, very careful to point out that we have two broad sets of policies here, and that this administration is deeply committed to trade and to free trade, and have demonstrated that loud and clear in the year that the administration has been in office.

We also recognize the fact that fundamental to a sound economic policy is a sound environmental policy, and that there are going to be times when one may bump up against the other.

Let me cite one that has been extraordinarily successful—the treaty on ozone depletion, in which the nations of the world agreed that this was a very significant environmental threat, and the nations of the world got together and authorized the use of trade sanctions to those who did not agree with the protocols for limiting ozone depletion, for limiting the use of ozone substances.

Now, that has worked dramatically well, and in that situation, nobody was closing markets. We were using the threat of trade sanctions, and the world complied, and we have had a very significant victory and advanced the cause of saving a very fundamental part of the global environment.

Senator DANFORTH. Were those generalized trade sanctions, or were they sanctions against specific products?

Mr. WIRTH. They were sanctions that said that if countries do not agree with the Montreal protocol, then countries are authorized to bring sanctions against them, and those are broad trade sanctions that could be used——

Senator DANFORTH. For anything. So, you could say——

Mr. WIRTH. No, against countries who were engaged in the use of those specific ozone-depleting products.

Senator KERRY. But what the Senator is saying is, you could decide what you wanted to target in retribution for their noncompliance.

Senator DANFORTH. You could say, we are not importing their oil, for example, or whatever.

Mr. WIRTH. Right.

Senator DANFORTH. I do not know. That may be right. To say that there are examples where it has been done does not mean that I think we should expand it, or that we should create a whole new

round of negotiations for the purpose of setting up an international regimen for doing it on a broad scale, much less have a unilateral program in the United States where you say, if we do not like something that is in the air, we have the power, then, to impose generalized trade sanctions because of our complaint about an air pollution problem.

Mr. WIRTH. Again, another piece of this is to insist, as we have done, and I think done very successfully, that there be a scientific base for this, for any steps that may be taken. Getting the international community to agree on various protocols, again as was done with Montreal—it is terribly important that we agree as to what is the scientific base and on what information do we build agreements among nations, and on what basis do nations have the right, then, to act.

Now, I think to reach to say that these are, I think, nominally in the name of the environment is not in any way, shape, or form, the intent. We have said over and over again that the scientific base is terribly important to do so.

Senator DANFORTH. Here is what I mean by "nominally." Nominally, what I mean is, let us take the rhino horn example—the People's Republic of China. Let us say there is some industry—say, textiles in the United States, which is being adversely impacted by imports from China. I would argue that those impacted sectors of our economy are very vocal in trying to withdraw MFN status for China for human rights purposes.

In other words, human rights is not a concern that is just benevolently developed. It is something that is very much related to the economic impact of what the end game is, which is to try to reduce the flow of imports into the United States.

So, I think if you create some legal means of keeping out products from another country, there are those who are going to find it, and they are going to try to use it to the best of their ability.

Mr. WIRTH. Again, I think I would disagree with you, and the administration certainly would disagree with you on the purposes of what we are doing in the linkages of most-favored-nation status, trade, and human rights in China, but that is a separate issue.

Senator DANFORTH. I am not making a statement about your purposes. I am not making a statement about your purposes. I do not know what your purposes are. I am making a statement that the fact of the linkage creates the potential for a misuse of it.

Mr. WIRTH. Let us go back to rhinos.

Senator DANFORTH. Right.

Mr. WIRTH. The purpose of what we are doing and what we are required to do under the law and what the international community has done is to try to save the rhino. That is the goal. We have all agreed that that is, and I think most nations agree that that is what we would like to do.

Now, one of the biggest problems in saving the rhino is obviously the export of those rhino parts, so if you can get at that market, that backs up and helps to save the rhino. In this situation, it has turned out, it has been our judgment so far that working with countries to understand the linkage of killing rhino to the markets and then how they enforce the markets is the best way for us to get at it, and we have not, therefore, gone the trade sanction route

but have gone the technical assistance route, the monitoring route, the cooperative route to try to show the nations impacted, and we have gotten good response from the Taiwanese and from the Chinese on this to say, show us how to do this. How do we make this linkage?

Now, maybe they are not being fully straightforward with us, but we are being very serious about that and continuing to put that on the table and in fact trying to keep that separate from the most-favored-nation status and the other discussion that is going on, just as we have kept separate the smuggling issue, the alien smuggling issue. They have been very cooperative on that. We are trying to move in that direction and to get them to understand that linkage, and the way to do it is through this kind of cooperative venture and through the technical assistance way.

Senator DANFORTH. Well, Mr. Chairman, you have been very generous, and I have overstayed my welcome, but I would like, if I could, just to make a few brief points.

The first is that what I hear Secretary Wirth saying is that the nonuse of trade sanctions, therefore, is simply a matter of the sufferance of the administration, rather than free trade being something that is enforced by an international regime. It is going to be a matter that is going to be simply at the sufferance of an administration, which reserves the rights to use trade sanctions for these very laudable purposes if it wants to do so.

My second point is that one of the problems with international trade is that historically it has tended to be the poor stepchild of other goals of American policy, especially foreign policy.

The Finance Committee historically, regardless of Democrats, Republicans, whoever the administration is, the idea of enforcing the rights created under trade agreements has very often been ancillary to other goals of American policy, so that we have tended to flinch from using what rights we have under the trade agreements, or trade laws, because of foreign policy concerns or other concerns. I see trade becoming just the poor stepchild of this, whatever is created in this new round of trade negotiations that Mickey Kantor keeps talking about.

So, those are really the points that I wanted to make. I have to tell you that this idea of blue round, green round, gives me the willies, and I can see it coming—I can see it coming, and the idea of unilateral measures also gives me the willies, and I would also point out to you that if the United States believes that we can do it to other countries, they will do it to us.

They will do it to us. They will be making complaints about what we do in the United States, and they will be attempting to use trade remedies or, in the alternative, if we use trade sanctions against them and it is not within GATT, they are going to be retaliating against us, and it is going to be like that, so we are going to be shooting ourselves in the foot if this is going to be our policy.

Clearly, I am for the environment, but I am just saying to you that this in my opinion is a wrong-headed approach.

Mr. WIRTH. If I might just put one—I appreciate what you are saying, Senator Danforth. What we are groping with at this point is what institution to set up to resolve what we think are emerging issues.

We all agree that these issues are going to be out there. How do we resolve those issues? We believe that the world is looking to see what is the United States going to do? What do you think about it? How do you think it ought to be done? We are engaged in that process with this hearing today.

We currently are advocating a standing Environment and Trade Committee at the World Trade Organization to be the mechanism for doing this, and we are trying to establish what would be the framework for the discussion there. That is where we are at this point.

Now, you are taking it a number of steps down the line and saying, what would be authorized by such a standing committee, and that is what this hearing is about. We have a long road to go to answer that question.

Senator KERRY. Let me say to my friend that he has not at all overstayed any welcome. I think it has been extremely helpful to develop exactly what the problem is here.

I both agree with him and disagree with him. I think there is no question, because it is already happening, that people use excuses, calling something one thing when in fact it is a trade barrier. We already see that.

So, is there a potential that someone could claim, or that another side is going to assert, wait a minute, you are not really asserting the interests of the environment, you are really just trying to interfere and have an unfair trade advantage, or you do not really want us to clean up the air to that level, you are just trying to force us without scientific certainty to impose high enough costs on our business so that the costs of our business are higher, and therefore we are less competitive. That is exactly the struggle here. That is exactly the struggle.

But where I disagree with you is, and I said this before you came in, the new paradigm, I believe, of trade, makes it inevitable that we will have to create a playing field, a set of rules, and heretofore, because of our economic power, because of the lack of the presence of these issues in terms of their developed form in a lot of these countries, we have been able to go down to separate tracks, and it has not been on the table.

I respectfully suggest, I do not think you can not have it on the table today, because, for instance, if our liberal, open, free trade policy invites our manufacturers to rush off where labor is absolutely a negligible cost, and where they have no liability insurance, no workmen's compensation, no zoning requirements, and above all, no environmental restraints at all, and therefore our capital moves to that particular location, and without regard to our own laws builds a plant that results in their workers undertaking a toxic waste dumping process, or an air polluting process, we are also victimizing ourselves.

So, the question is whether or not the American worker is going to be required to work according to these standards and suffer the loss of that capital, and ergo the loss of jobs, because we are not asking other people to live up to standards that we know are going to improve the life not just of their citizens, but ourselves.

I do not see how you can avoid that question any more. I think it is on the table, but I think the Senator has made a very impor-

tant argument to the effect that, just as we have had to create a set of rules to order the way in which we are trading and understanding intellectual property and rights of access to the marketplace and all of these things, it is going to be very difficult to do much of this unilaterally. It is mostly going to have to happen through some kind of an agreement, which the Senator seems to say he dreads our arrival at.

I think there are possibilities, even, of defining the terms under which you move unilaterally, where the nexus is sufficiently definable in terms of both interest and cause and effect, because I do not think any nation can afford to sit there, if there is some absolutely world egregious practice taking place that spills over into other countries, and just let it happen, but the question is, defining the nexus, and defining the circumstances adequately, and perhaps even having that standard sufficiently defined and acceptable within the international arena so that it is permissive where that situation arises, and in fact, Senator Wirth has pointed to that kind of example.

We have a vote on. I think you should comment, perhaps, to close this panel. There is one area that I have not had a chance to explore with you. I wanted to know the makeup of the committee that you are putting together under GATT that is going to settle some of these issues, who is going to be on the committee, and what kind of transparency will there be with respect to this, so that people who are interested in this will be able to have some input and perhaps deal with some of the concerns and fears that Senator Danforth has expressed.

Mr. WIRTH. Mr. Chairman, if I might ask USTR, who was doing the negotiation, to respond to that—to respond to the structural issues. The United States has advocated in all of these forums as much transparency as possible, feeling that that is part, again, of this international set of agreements. But let me ask USTR—we will ask them to respond to your specific questions about the makeup.

Senator KERRY. Do you want to wrap up? We are on the back end of the vote. But do you want to comment on Senator Danforth's and our colloquy?

Mr. WIRTH. I think it is a very fair discussion. I think Senator Danforth is asking just exactly the sort of questions that have to be answered, and that is what we are here to begin the process today: of seeing if we can understand where we in the United States ought to be coming out, in terms of the next steps of the new standing committee that is going to be set up. We are trying to define exactly the principles that would cause us to act.

The next step is, then what are the remedies?

Once you decide that you are going to act, what remedies are acceptable?

And what you would suggest is do not use trade as a remedy; you can use a variety of other things as a remedy perhaps.

Well, if we decided to use trade, what constraints ought to be on it?

That is precisely where we want to be in a discussion with you, and with the American business and environmental NGO community, as well.

We thank you very much, Mr. Chairman, for this opportunity. It was very helpful to us.

Senator KERRY. Tim, thank you very much for appearing. It is a good beginning. It is only a scratching of the surface. There are a lot of details and a lot of examples of problems that we need to work through. But I think it is a good framework, and I appreciate your setting down those principles as at least a beginning place of discussion. And thank you very much for your time.

Mr. WIRTH. Thank you, Mr. Chairman.

Senator KERRY. If we go vote and the second panel will set up, we will begin as soon as we get back from the vote.

[A brief recess was taken.]

Senator KERRY. The hearing will come to order.

I apologize to folks for the delay, and I also apologize if we went a little long on the first panel and have kept some folks here.

What I would like to ask for, which I normally do, is a 5-minute summary, and then we can get into a dialog between yourselves, myself, and we will go back and forth a bit.

Now, I understand Jay Hair unfortunately had to leave here to go to a meeting. Fortunately, he is meeting with Secretary Babbitt, so that is OK.

So, his stand-in is Stewart Hudson, and we welcome you; and David Schorr, Ken Berlin, and Robert Housman, thank you for being with us today. We appreciate it.

You have heard the prior colloquy, so I think we have got some good stuff to work off of and play around with a little bit. Why don't we go at it.

STATEMENT OF STEWART J. HUDSON, LEGISLATIVE REPRESENTATIVE, NATIONAL WILDLIFE FEDERATION

Mr. HUDSON. Great, I appreciate it. And I will try to stick to 5 minutes.

I think I would like to say at the outset something that was missed, I think, from the previous conversation is that what is really being sought here is bringing some order to what is currently a very disorderly process. I think the chairman hit it right in saying that, to a great extent, this is an inevitable endeavor that we have to be engaged in. And it is clear that this administration and, frankly, a lot of the environmental groups involved are not doing this to close down markets, but to assure that those markets of the future are open to American industry, as well as other industries around the world, that want to compete on a playing field that is based on sustainable development.

In any event, not to use my opportunity without permission from Jay Hair, let me return to the testimony that was prepared.

The Federation has been involved in trade and environment issues for over 5 years. And I would like to use this testimony today to outline some of the steps for the future. But let me begin just briefly by touching on the general theme of trade, environment and sustainable development.

Since 1947, when GATT was brought into play, the world has changed dramatically. The globalization of the world's economies is paralleled by a more global nature with respect to our environ-

mental problems, both in terms of the problems themselves and how you deal with them.

In any event, this means that these, at times, competing interests must be dealt with together and, for that reason, the inevitable desire to figure out how to deal with trade and environment.

Free trade agreements can lead to greater economic growth. At the same time, there is no guarantee that this will necessarily create a pool of funds for environmental protection. So, promoting trade as a panacea for environmental problems—the argument that free trade is good, the more free trade we have is better—simply does not hold water.

Let me also say that being critical of free trade does not in any manner, shape or form mean that protectionism is an adequate response. Protectionism rewards an inefficient use of resources, and its most direct impact is felt in the developing countries. While it might be justified in very, very narrow situations—new industries, developing countries—it is certainly not a good response to the deficiencies of free trade.

The good news is that there are other ways of harnessing the benefits of liberalized trade in the name of sustainable development. We believe that is exactly what the Clinton administration's new trade policy is all about. And, as President Clinton indicated during the signing ceremony for NAFTA, which could not have been a more symbolic example of this policy, it emphasizes liberalized trade, but also environmental concerns, as well as those of worker rights and competitiveness.

Now, the GATT is the most important arena in which this new policy will be put in place from the ground up. Nothing is inherited about what comes next with respect to the GATT. The ideas that I am going to present are drawn largely from a report we have, entitled "The Road to Marrakech: An Interim Report on Environmental Reform of the GATT in the International System." I believe the staff of your committee has that. We will provide it if you do not.

But these are the ideas that I will highlight.

First of all, as was mentioned, a permanent committee on trade and environment as part of the World Trade Organization is an absolute necessity. That must be part of the agreement, part of the ministerial declaration that is agreed to in April. There is only one way for environment to be considered in a meaningful fashion and it must be with this committee.

In any event, there are some more ideas we have presented about that committee in our testimony. But what is important as well is to think about the work program of the GATT. Now, there has been a decision to form this program. But there is not at this time any specific idea of what the reform program should include.

At the outset, it is critical to understand that reform of existing GATT articles is absolutely essential to remove what we feel is a bias that is decidedly antienvironmental and antisustainable development. Written in the 1940's, the basic GATT articles are obsolete for dealing with the relationship between international trade and countries' obligations under multilateral environmental agreements.

GATT procedures are also in need of reform. The chairman already knows that secretiveness and the lack of public participation undermines any attempt to deal with trade and environmental issues effectively.

In other areas, new issues have emerged. The relationship, for example, between the Uruguay Round provisions on intellectual property and the possibility that these same provisions can be used to encourage sound management of biological diversity is now the subject of much debate. This is something the committee should look into.

There has also been little attention within the Uruguay Round for dealing with investment and the problem of creation of pollution havens, which you mentioned in your remarks about the flight of capital to areas where there is lax environmental enforcement or standards. We, I believe, crafted some important provisions in the NAFTA. They, in fact, enjoyed the support of the USTR's Investment Policy Advisory Committee, which is comprised mostly of business leaders. There is one environmentalist on it, and that is Jay Hair.

They have also endorsed our call for this committee to explore the adoption of investment provisions as part of the trade-related investment measures under GATT.

I think we need to look at elimination of harmful subsidies, such as agricultural subsidies, water subsidies, hidden price supports, such as those that are given to mining industries, such as, for example, in our country, that distort trade. Again, that is the central focus of Senator Danforth's remark that we do not distort trade. And I think it is important that these ideas form the basis for the work program of the GATT.

I think it is important, in conclusion, to note that this is not an antitrade agenda. But that if environmental groups are to be supportive of liberalized trade—and we have demonstrated our willingness to do that—at least some of us—as part of NAFTA, then there has to be a decision to form a committee on environment as part of the WTO. There has to be a sound reform agenda, which will dictate the future activities of that committee.

If international trade is going to promote sustainable development, it must prize efficiency, not necessarily in terms of the amounts of goods and services flowing around the planet, but, rather, in the efficient use of those natural resources and the equitable distribution of trade's benefits.

The golden opportunity and challenge facing governments now is to ensure that the strategic principles that foster sustainable development are woven into the very fabric of rules that govern world trade. This can only happen if GATT parties adopt an ambitious and pro-environmental program of work, and only if institutional mechanisms are in place, such as the WTO Committee on Environment.

Thank you.

Senator KERRY. Thank you very much, Stewart. David.

STATEMENT OF DAVID K. SCHORR, SENIOR PROGRAM OFFICER FOR TRADE AND THE ENVIRONMENT, WORLD WILDLIFE FUND

Mr. SCHORR. Thank you, Mr. Chairman.

My name is David Schorr, and I am the senior program officer for trade and environment at the World Wildlife Fund. As you may know, Kathyrn Fuller, the president of the World Wildlife Fund, sits as the only environmentalist on the President's Advisory Committee for Trade Policy and Negotiations. And so we have obviously taken a very active interest in this issue. I thank you for calling these hearings.

Mr. Chairman, as you so eloquently described this morning, there really can be no doubt that trade and the environment relate to one another. That is, that trade rules and trade itself have an impact on our planet's health.

We have just begun a journey toward integrating trade and environmental policies, through the NAFTA, which the World Wildlife Fund supported, because we believed it was a significant step down the correct road. But, so soon after we have begun our journey, we find ourselves at a crucial crossroads. And the question now is whether we are going to continue along the path to what I would call "sustainable trade," or whether we are going to turn into a cul de sac or into an unproductive detour. I am referring of course to what is happening at the GATT.

Mr. Chairman, the GATT, unlike NAFTA, has had a history of indifference and sometimes open hostility to environmental concerns. My written testimony sets those environmental flaws of the GATT out in several categories. I will leave it to the reading for those details. I think most of them are familiar to you.

The question is: Where are we today? What has the Uruguay Round done to address these historic shortcomings of the GATT?

Well, fortunately, the Clinton administration took up the calls by environmentalists for reform at the GATT very soon after coming to office. The administration adopted a two-pronged strategy at the Uruguay Round. One was to seek limited changes in the Dunkel text before the end of the round; and the second was to look for an opportunity after the round for more comprehensive reforms.

With regard to the first prong, the USTR fought a valiant rear guard action on some aspects of the Dunkel draft, and brought back what I think are some notable changes in what would have otherwise been a wholly unacceptable text. I will leave it to your questions to go into any textual details.

With regard to the future, the administration was able to secure the Trade Negotiating Committee's decision to implement a work program. They were unfortunately not able to secure a trade and evironment committee within the WTO.

The TNC decision constitutes an important step forward. It suggests that trade and the environment has made it onto the agenda at the GATT. But having just returned from a roundtable with the EU in Europe and from Geneva, where I had an opportunity to meet with a number of GATT delegations and with members of the GATT Secretariat, I can tell you that although we are in fact on the agenda in people's minds as well as on paper, what people are saying in Geneva is not all encouraging.

Many of the delegations at the GATT remain resistant to the greening of the GATT in any significant form. Even those who are willing to contemplate the idea of a greening of the GATT resist a number of the things that environmentalists consider most important.

For example, we are hearing especially strong resistance to measures under laws such as the High Seas Driftnet Act or the Marine Mammal Protection Act that seek to protect global commons beyond national boundaries.

We are hearing that process and production method product standards are anathema to developing countries. And we are hearing that the least trade restrictive principle, enshrined in the GATT Tuna-Dolphin decision, is the only way to avoid so-called green protectionism.

On process, we are also hearing almost unanimous rejection of NGO participation or transparency in the work program procedure itself. This is of grave concern to us.

And, finally, we are hearing those time-honored harbingers of deadlock—that is, calls for patience and deliberate process.

Mr. Chairman, the most immediate concern now is that the work program be put in place in a way that allows productive reforms of the GATT, concrete and prompt reforms of the GATT. Unless the structure of the work program is adequate, we will wind up nowhere.

We believe there are four keys—four keys to an adequate work program. All of these, I would say, are still in some degree of play in Geneva.

First, the agenda must be comprehensive. It must be comprehensive and open ended. There are going to be efforts at Geneva to create a work program of limited duration, so that any committee that is created will go out of existence as soon as that program is over. The agenda must make clear that trade and evironment are inevitably linked, as you have said, and that it is an ongoing problem.

Second, a trade and environment committee is an absolute necessity, as my colleague from the National Wildlife Federation has just said. Best would be a committee within the charter of the WTO itself.

Third, there must be a timeline, Mr. Chairman, in this work program. It must be outlined in the work program itself. And the timeline must make clear that proposals for reform should be returned within a certain period, without prejudicing the continuing work of the committee after those initial proposals are brought.

And, fourth, very importantly, there must be transparency and access for environmental expertise. This means that the work program should be open to public scrutiny, with NGO's allowed to observe the procedure and, equally important, that governmental delegations to the discussions include representatives of environmental government agencies as equal partners in the dialog. That is, we must not have only trade negotiators negotiating this.

Mr. Chairman, I would have liked—perhaps we will get to it in the questions and answers—to respond somewhat to what Counselor Wirth said this morning. But, before concluding, I want to refer back to the tiger and rhino situation.

Mr. Chairman, the tiger and rhino situation is one of the clearest trade and environment conflicts before us, and it may be one of the clearest we will ever see. The illegal trade conducted here is unquestionable. The effect on the species at risk is also unquestionable. It is very possible that this winter or next will be the last winter in the wild for the Siberian Tiger.

We have here an obviously legitimate case where both an international body and U.S. law clearly support sanctions. It would be a grave error, especially at the opening of a dialog on how trade and environment relate, for the administration not to impose sanctions if they are required by conservation science.

We have often heard that there are other factors that need to be considered when a nation considers sanctions for environmental reasons. Here, I suggest there is a strong policy reason for the purposes of advancing our agenda at the GATT, to make clear that when there is an unquestionable scientific basis, an unquestionable international consensus on what ought to be done, and a legal basis to do so in the United States, we must go ahead and impose those sanctions.

I thank you.

[The prepared statement of Mr. Schorr follows:]

PREPARED STATEMENT OF DAVID K. SCHORR

Thank you, Mr. Chairman and members of the Subcommittee. My name is David Schorr, and I serve as Senior Program Officer for Trade and the Environment at World Wildlife Fund. With affiliated offices in nearly fifty countries, WWF is the largest private organization working worldwide for the conservation of nature. As you may know, WWF took a very active role in the recent debates over NAFTA and more recently in the final stages of the Uruguay Round talks in Geneva. WWF president, Kathryn Fuller, sits as the sole representative of an environmental organization on the President's Advisory Committee on Trade Policy and Negotiations. Accordingly, we have a specially keen interest in the topic the Subcommittee has chosen to investigate today. On behalf of WWF, I would like to congratulate the Chair and his colleagues on the Subcommittee for having the foresight to open these hearings, and also to thank the Chair for inviting WWF to offer its testimony.

Mr. Chairman, there is no doubt that international trade and trade policy affect the Earth's environment. Whether we look to the industrial wasteland of the maquiladora along the Mexican-American border, or to the clearing of ancient forests in the tropics and the American Northwest, or to the plight of dolphins in the Eastern Tropical Pacific, or our dwindling fisheries in the Atlantic, or even to the laws we pass to control the amount of automobile exhaust we breathe, we will find that what we trade, and the rules and institutions governing how we trade, have a powerful effect on the health of our planet. Indeed, there could be no clearer example of the environmental impacts of both trade itself and of trade policies than the current case of the Black Rhinoceros and the Siberian Tiger. As we sit here this morning, these two magnificent animals are being driven to the very brink of extinction by the forces of international commerce. Meanwhile, policy-makers in this city and elsewhere debate whether trade measures can appropriately be applied to protect them.

Yet, despite the clarity and familiarity of the examples I have just described, the need to integrate trade and environmental policy-making has only recently begun to gain broad acceptance. The negotiation of the North American Free Trade Agreement was an historic first step down the path towards what I will call "sustainable trade"—that is, liberalized trade that works for, rather than against, environmental protection, resource conservation, and sustainable development. Because WWF believed that NAFTA was a significant step down this path—and because we believe that environmentally responsible trade will help provide developing countries with the resources they need to address their environmental challenges—WWF strongly supported the NAFTA during its consideration by Congress.

The NAFTA has now been in force for barely a month. But as short as our journey towards sustainable trade has been to date, we have already arrived at an important crossroads. Mr. Chairman, the hearings you have convened today are especially

well timed, because in the months ahead the international community will decide whether we shall continue along the way towards environmentally responsible trade, or whether we will turn instead off that road onto an uncertain detour, or even into a dead-end. I am referring, of course, to the situation at the GATT.

As you know, Mr. Chairman, unlike NAFTA, the GATT has a long history of indifference, and sometimes open hostility, to environmental concerns. The GATT can be considered to have four basic environmental flaws.

First, some GATT rules threaten to diminish the effectiveness of national and local environmental regulations by treating them as barriers to trade. For example, the European Union is currently challenging the legitimacy of certain U.S. automobile emission standards, claiming they are unfair to some European exporters.

Another way GATT rules can diminish environmental protection is by discouraging the use of trade measures, such as trade bans or quotas, that might otherwise be used to enforce national or international environmental laws. The United States has a number of important laws on its books—such as the Marine Mammal Protection Act, the High Seas Driftnet Act, the Wild Bird Conservation Act, the Sea Turtles Act, and others—that allow or mandate the use of trade restrictions in support of efforts to protect the environment. Some of these laws work in close conjunction with international treaties or other international instruments. But even when governments impose trade sanctions in accordance with multilateral environmental treaties, they risk contravening the GATT.

The GATT's second basic environmental flaw is that it fails to encourage sustainable trade. In fact, some GATT rules actually prevent the use of trade measures that could promote sustainable trade. For example, GATT forbids distinguishing between otherwise identical products on the basis of "production and process methods" or "PPMs". According to the GATT, it doesn't matter whether your product was produced in a sustainable way, or in an unsustainable way. In the famous "Tuna-Dolphin" case fur example, a GATT panel ruled that the U.S. violated the GATT by treating "dolphin-safe" tuna fish differently from tuna that was not deemed dolphin safe. In this regard, it is interesting to note that the GATT, unlike the NAFTA, imposes no requirement that GATT parties maintain and enforce a minimum level of domestic environmental protections.

Third, the GATT has neither an institutional mandate nor the appropriate mechanisms or procedures to monitor the impacts of trade or trade rules on the environment. This stands in stark contrast to the Commission on Environmental Cooperation created by the NAFTA environmental side agreement.

Fourth, the GATT has habitually operated behind closed doors, making important decisions that effect the Earth's environment without the opportunity for public debate, and without the benefit of environmental expertise. History has demonstrated that open democratic process and the participation of expert individuals and organizations are essential to environmentally sound policy-making.

Without fundamental reforms to address these shortcomings, trade liberalization under the GATT will likely result in trade and trade policies that do real harm to the Earth and its living resources.

Since approximately the mid-point of the Uruguay Round, environmentalists have been advocating in earnest for reforms of the GATT system to address these shortcomings. Calls for reform gained added force after the GATT panel ruling in the famous "Tuna-Dolphin" case in September 1991. But as the Round developed, and particularly with the release of the so-called Dunkel Draft in December 1991, it became clear that the Round was moving in the wrong direction on the environment. Fortunately, the Clinton Administration took up calls for environmental reforms at the OATT soon after taking office. But rather than seeking to confront a full range of environmental issues immediately, the Administration adopted a two-prong policy of seeking limited changes now, while deferring comprehensive reforms until after the Round ended.

The Administration's strategy has brought mixed results. With regard to the first prong of its approach, the U.S.T.R. worked vigorously—and at times against very steep odds—to modify some of the most objectionable provisions of the Dunkel Draft. Front an environmental point of view, this was largely an exercise in damage control. The result was some notable improvements in the text, although in other cases the U.S. position did not prevail. I will not take the Subcommittee's time to outline these successes and failures in any detail, although I will be happy to answer any questions you may have at the conclusion of my remarks. In any case, I note that my colleagues at the National Wildlife Federation have produced an excellent and timely paper on these details, which I understand has been distributed to the Subcommittee along with the remarks of Dr. Jay Hair. I would also refer the Subcommittee to the recently released report of the President's Advisory Committee on

Trade Negotiations and Policy, which reflects in some measure the analysis of World Wildlife Fund.

In any case, the limited changes sought by the U.S. during the last phases of the Round were destined to leave a number of the most fundamental and problematic issues in the GATT unaddressed. Indeed, some of the most damaging aspects of the Tuna-Dolphin decision—such as the application of the "least restrictive to trade" principle—were given wider effect than they had enjoyed in the pre-Uruguay Round GATT. Also profoundly disturbing' was the creation of a future "World Trade Organization"—or "WTO"—that is devoid of an operational mandate or an institutional structure to consider and respond to environmental concerns.

The second prong of the Administration's approach—seeking to make environmental reforms the subject of separate negotiations immediately after the conclusion of the Uruguay Round—led ultimately to the adoption, on the final day of formal negotiations last month, of a formal decision by the TNC (the Trade Negotiating Committee of the GATT parties) mandating the development of a work program on trade and the environment. The work program is to be presented for adoption at the GATT ministerial in Marrakech this April, when the Uruguay Round will formally conclude. As you know, Mr. Chairman, this result was in part a disappointment to the U.S., which had also sought the creation of a permanent Committee on Trade and the Environment within the WTO.

The TNC decision constitutes an important step forward. While not lacking in clauses that characterize environmental regulations as threats to liberalized trade, the TNC decision contains an explicit mandate to consider "whether any modifications of the provisions of the Multilateral Trading System are required," and refers to the need for "effective multilateral disciplines to ensure the responsiveness of the Multilateral Trading System to environmental objectives." As a compromise over the U.S. insistence on a Trade and Environment committee, the decision calls for "recommendations on an institutional structure" for the execution of the work program.

So far as it goes, this is good news. It suggests that trade and the environment has made it onto the agenda at the GATT. But having just returned from a roundtable on trade and environment hosted by the European Union, followed by a few days in Geneva meeting with various delegations to the OATT and OATT officials, I can tell you firsthand that while trade and the environment clearly is on the agenda in people's minds as well as on paper, what they are saying is not all encouraging.

Some delegations, particularly from leading developing countries, are highly resistant to the prospect of "greening the OATT" in any significant way. Moreover, the trade technocrats who continue to dominate the debate bring a strong institutional bias against many of the reforms that most environmentalists feel will be necessary. We are hearing especially strong resistance, for example, to suggestions that national governments ought to be free to take measures, under laws such as the High Seas Driftnet Act or the Marine Mammal Protection Act, that seek to protect the global commons beyond national boundaries. We are hearing that trade measures based on "production and process methods" are anathema to many developing countries. We are hearing the "least trade restrictive" test is the only workable alternative. And—with regard to procurement—we are hearing the GATT members reject virtually unanimously the opening of the trade and environment negotiations to public scrutiny or NGO participation. Finally, we are hearing those time-honored harbingers of deadlock—calls for patience and careful, deliberate process.

All of this adds up to a significant basis for the fear that—although we have put trade and environment on the agenda—we have not yet achieved the political will to begin a bona fide process of prompt and effective reforms at the GATT. Certainly, in the absence of strong leadership from the United States, the likelihood of any progress is slim. And so, we find ourselves at the crossroads which I have described.

Mr. Chairman, we would like to urge the Congress to play an active role in helping the international community choose the path toward sustainable trade. The most immediate concern is the development of a solid work program on trade and environment at the GATT. The next eight weeks are pivotal. The work program that will be adopted at the April ministerial meeting in Marrakech will set the parameters for the discussions and negotiations to follow, in terms of both substance and procedure. Unless the structure and mandate of the work program are adequately crafted, the process is very likely to bog down or derail.

In our view, there are four keys to an adequate work program:

First, the agenda for the upcoming discussions must be comprehensive, flexible, and open-ended. It must be clear that the mission of the work program is to examine the GATT system from stem to stern, and to propose whatever reforms are necessary to create a system that promotes sustainable trade.

Second, the discussions themselves must be placed in an institutional context that reflects and supports the high priority they should enjoy. This means that the creation of a GATT committee on trade and environment is absolutely necessary. Given the central importance of integrating trade and environmental policies, Article IV:7 of the proposed WTO charter should be amended to include the Committee on Trade and the Environment among the permanent standing committees at the organization's core.

Third, the work program must contain an appropriate timeline for the completion of the initial phases of its work. A time frame of approximately two years for the committee to return proposals for the first set of reforms would be appropriate. In addition, the timeline should also stress the ongoing character of the committee's work.

Fourth, the trade and environment discussions at the GATT must not be allowed to proceed as a set of secret negotiations among trade experts. It is vital that the process be transparent, and include environmental experts as equal partners in the dialogue. This can be accomplished by allowing environmental NGOs to observe the talks, and by assuring that governmental agencies charged with environmental responsibilities are full participants at the negotiating table.

Mr. Chairman, the Congress will have a variety of opportunities to help promote the so-called "greening of the GATT." We look forward to working with you and other members of the Subcommittee in developing productive legislative proposals. In the coming weeks, however, it is extremely important that the Congress keep the work program negotiations in their minds and in their contacts with the administration, as well as with representatives of other governments that are involved. The negotiation of the work program at the GATT is beginning in earnest this week, and is likely to conclude by the end of March.

As we move forward, Congress should also be seeking particular opportunities to address each of the four basic environmental flaws at the GATT that I have previously described. To that end, I would like to stress one particular proposal at this time. Pending changes in GATT rules, the U.S. should seek—and Congress should encourage—a global moratorium on the use of trade rules to attack environmental laws and initiatives. Such a moratorium would both contribute to ongoing efforts to protect the Earth's environment, and provide the political impetus needed for a constructive dialogue on trade and environment.

Throughout this period, it will be essential to keep close tabs on the progress of NAFTA's implementation. How NAFTA is implemented will have significant effects on the trade and environment agenda at all levels, including at the OATT. Of particular importance will be the strength and independence of the Commission on Environmental Cooperation—or "CEC"—which is now being set up. Congress should do all it can to ensure that the CEC is sufficiently funded and staffed, and that is properly insulated against political pressure from its member governments.

Mr. Chairman, in closing I would like to return to what I believe is one of the clearest trade—environment conflicts before us—indeed, one of the clearest that we are likely ever to see, and one that demands prompt action. I am speaking of course of the illegal trade in tiger and rhino parts, in open violation of the Convention on International Trade in Endangered Species of Wild Fauna and Flora. It is uncontested that China, Taiwan, and South Korea continue to trade in products from these animals, that these countries together account for the major portion of trade in these species, and that poaching for trade has pushed the last surviving animals to the very edge of extinction. Siberian tigers, for example, are now confined to a single remaining viable population in far east Russia, numbering perhaps three hundred or so animals. The economic—that is to say trade—pressures on these tigers are intense. Unless something is done, this winter is likely to be among their last. Similarly, trade in rhino horn has reduced Black Rhino populations by 90 percent in the last two decades alone.

These animals are protected under U:S law and by international agreement, both of which explicitly call for the use of limited trade measures to enforce the ban on trade in endangered wildlife. In a striking show of unity, the CITES Standing Committee has essentially called for trade sanctions against China and Taiwan. But last November, in what has become a troubling pattern of failure to invoke the Pelly Amendment, the administration chose not to impose sanctions, pending a reevaluation this March.

It is an old saw that "hard cases make bad law". Perhaps something of the inverse is also true: that clear cases may provide a beacon for better law and policy. We at WWF believe the CITES violations are that clear case. As we face the complex challenge of integrating trade and environmental policies, it would send exactly the wrong signal for the U.S. to refrain from making responsible use of trade measures in a case whose legitimacy and urgency are beyond dispute. On the other hand, a

demonstrated willingness to respond to this quintessential trade-environment conflict—the trade-driven extinction of two of the most magnificent animals on Earth—would be a sign that we are serious about our task.

Thank you.

Senator KERRY. Thank you very much. I appreciate the testimony.

Ken Berlin, I enjoyed your Washington Quarterly article enormously. The floor is yours.

STATEMENT OF KENNETH BERLIN, MANAGING PARTNER, WINTHROP, STIMSON, PUTNAM & ROBERTS

Mr. BERLIN. Thank you very much.

Senator, what I would like to do in the limited time I have is turn to the question, really, of why people are resistant to, and worried about, a trade and environment agenda. And that means whether it is people in developing countries, whether it is Senator Danforth, to a certain extent, and to try to look at what are the issues that are bringing about resistance to this kind of program.

And I think the obvious issue is there is a fear that a trade and environment agenda can be either abusive or oppressive on the trading system. The oppressiveness comes from typical worry about regulations affecting business activity. We can all look at that today in a very sophisticated way. We have a lot of experience in the United States with how to deal with those kind of issues. And I think we can go forward in a way that deals with that.

But the abusive question, I think, is a trade-related question, and one we have to pay very careful attention to.

I do think a system can be crafted that avoids those kind of fears of abuse. And that system has to really go both ways, both abuse by environmentalists who—or, if not by environmentalists—abuse by someone, to use environmental laws to interfere with the trading system, but also abuse by the trading system to interfere with environmental laws.

And let me just very briefly deal with that first, because that obviously has caused a lot of opposition in the environmental community to NAFTA, and in fact is a cause of some of the opposition here.

I think some of the problem arises from the fact that the international trade community has a very, very difficult time dealing with this question of disguised restrictions to trade. Really, by definition, a "disguised restriction to trade" is a restriction that says it is doing something, but is really intended to do something else.

And when you say that to an international lawyer, and you say, "Well, therefore, the test should be let us try and find out what is a disguised restriction"for example, is there a legitimate purpose behind the law, as we decided to do in the NAFTA, a lot of international lawyers will come back and say, "We cannot judge the intentions of another country." That does not work. We have to have some other kind of test.

And one of the problems is that some of the other tests that have developed are ones that go beyond the question of what you need to do to deal with disguised restrictions to trade, and do arguably allow attacks on legitimate environmental laws.

For example, a "no more trade restrictive than necessary" standard means that you can in fact say a legitimate environmental law is not valid because there was another way to do it that is less trade restrictive.

Now, in my paper I try and analyze the impact of that, and whether it really is a significant additional tool in the arsenal of people who would attack environmental laws. And I reach the conclusion it is probably not. But the genesis of this is a very, very difficult time in coming up with a reasonable standard to judge what is a disguised restriction on trade.

On the other hand, how do you look at restrictions on products and process and production methods, and how do you assure that those are not abusive?

On the product side, generally, you are looking for nondiscriminatory conduct. And that is something that we have been able to do, and there is a long tradition of how that is done in the trading system.

The production and process method question I think is a very, very interesting one, and it is one where I have argued you have to make a distinction between industrial process and production methods and production and process methods affecting wildlife, marine mammals, and the global commons.

And the reason I make that distinction important is that if you look at our industrial system, we have a system where our environmental laws make distinctions between different kinds of facilities. There are different laws in Massachusetts and California. California law may be stricter than Massachusetts law. Law regulating new facilities may be more restrictive than law regulating old facilities.

We have always had a tradition of, in a sense, giving facilities time to come into compliance with law. The new Clean Air Act has compliance schedules that run for as long as 20 years.

So, it is very hard to say, here is the U.S. standard that we will act unilaterally on if Mexico does not meet that standard. Because we do not really have one standard.

There is also a lot of potential for abuse on that, because, for example, in semiconductors, if Japan wants to keep out U.S. semiconductors, they could theoretically write a law that says we have now strengthened our environmental provisions on semiconductors more than in the United States so we can now keep out U.S. semiconductors because they are not produced in the same way ours are produced.

But, beyond all those technical problems, I am not sure that we really want to go down a path of unilateral action on industrial methods. Because what we really want to do in countries like Mexico, or any developing country, is not go in and say, "You have 30,000 plants today that do not meet our standards, so we are cutting off your goods." We want to encourage those countries to come out, and develop a plan, develop a law that says, in the next 5 years, in the next 10 years, it will bring its facilities that exist today up to an acceptable standard.

And that is what we did in NAFTA. The NAFTA dispute resolution provisions do have a very strong concept developing action plans on how to go forward.

So, I believe very strongly that there is a legitimate role in the international area for industrial process and production standards. But I think they should be negotiated. They should be agreed upon by parties. They probably should not be done unilaterally.

On the other hand, when you get to the global commons, I think you have got a very different set of issues there. We have always regulated takings of marine mammals and takings of fish on the high seas. There are over 100 international treaties now dealing with those kind of issues. There are virtually no international treaties dealing with production and process methods.

If you take unilateral action dealing with a marine product, you are not interfering directly in the sovereignty of a country. Nobody had control over the high seas. And you are keeping out something that, in a way, goes beyond science. There is an emotional content here that you cannot ignore.

Suppose, for example, we decided that scientifically, for the next year, you could kill 250,000 dolphin and you would not endanger the species. And that might even be a decision you could make. I do not think that would be a decision that anybody in the United States would find acceptable, and certainly not one that politically I think you would want to have to deal with.

So, I think there are valid grounds on the marine mammal side and with the oceans and global commons to act unilaterally. But I do not believe that unilateral action makes as much sense when industrial process methods are involved.

The last point I would like to make is that this whole debate involves much more, though, than just these standards issues we have been talking about today, and much more than sanctions. The international trading system is the system under which we are going to interact with most of the developing world in deciding how we deal with the environment going forward.

There are very few tools we have that we can use to tell Mexico how they can deal with their environmental problems. There are very few tools we have to deal with Brazil and tropical forest destruction. We do, in the international trading system, though, have a system that affects the environment in a way that makes it legitimate to discuss the impacts of environmental protection within another country.

And I think if we look at this carefully and intelligently over the next few years, and deal on a step-by-step basis, so that we build confidence as we go forward, if you do things like you said today, in reaching out to other countries, which is absolutely necessary, as David just said, because of opposition to this from many countries in the world, I think we can accomplish far more than just addressing these narrow standard questions.

I think we can greatly increase our chances of protecting the world environment at a critical stage for the world environment.

[The prepared statement of Mr. Berlin follows:]

PREPARED STATEMENT OF KENNETH BERLIN

My name is Kenneth Berlin. I am a partner in the law firm of Winthrop, Stimson, Putnam & Roberts. I appreciate the opportunity to appear before the subcommittee to discuss the interrelationship between trade and environment issues, particularly the potential impact of international trade on the environment.

Although environmental concerns have played an important role in setting domestic economic policy for years in industrial nations, such concerns were, until recently largely ignored in the formulation of international economic policy. In general, we can date a sea change in this attitude to 1992 when the largest gathering of heads of state in history (110) met at the 1992 Earth Summit in Rio de Janeiro, Brazil. From the trade and environmental prospective, we can date a similar change to 1993 when environmental concerns led to the signing of the Environmental Side Agreement to the North American Free Trade Agreement (NAFTA), and when the signatories to the GATT began to pay their first meaningful attention to environmental issues by setting in motion events that should lead to the establishment of a trade and environmental subcommittee of the new World Trade Organization (WTO).

This history is an important starting point for any analysis of the interrelationship between trade and the environment because it means we are not starting with a clean slate. Before environmental concerns were recognized as important, a massive world trading system was established and it will continue to operate even if Congress rejects the Uruguay Round Agreements (or whether it had implemented the NAFTA). This existing system already has profound impacts on the environment. Thus United States rejection or acceptance of new trading agreements will not occur in a vacuum. The challenge is how can we improve the current structure, which came into being with little or no concern for the environment, and-which is likely to harm the environment unless it is changed.

I believe that this improvement will not happen in a day. As with almost every issue with which you deal in Congress, fundamental change in the trading system will take time, it must be built on experience, it must be based on realistic initial goals with a clear vision of how the goals can be strengthened over time. It will require hard and sophisticated work by the U.S. government, the Congress, environmental groups and U.S. business groups whom I believe also have important interests in a trading system that minimizes harm to the environment.

For the rest of my testimony, I will concentrate on specific issues that are raised by the trade and environment debate. I will divide those issues into two simple categories: (a) which aspects of the trading system can adversely affect environmental protection in the United States; and (b) how the trading system can be improved so that it benefits the environment or at least minimizes harm to the environment.

I. CHALLENGES TO LEGITIMATE ENVIRONMENTAL LAWS

The issue that has received the most attention in the trade and environment debate is whether trade agreements provide a basis to challenge legitimate environmental laws. Because the Congress is about to consider this issue in the context of the Uruguay Round Agreements, I will discuss it in that framework.

Conceptually, this issue arises in two contexts. The first is from the efforts of the trade community to harmonize product and agricultural standards. Such harmonization, however, can lead to a lowering of standards to a common denominator. In contrast the environmental community has sought to require not harmonized, but minimum, standards and that generally is how U.S. law works (few U.S. laws permit preemption of stricter state laws). Generally, during both the NAFTA and the GATT, the United States succeeded in preventing harmonization that threatens U.S. laws.

The second and more difficult issue arises from fear in the trade community that nations can use their standards, including environmental standards, to keep out competing products. This usually occurs through what the trade community calls disguised barriers to trade. As nations have reduced tariffs, such disguised barriers to trade have become increasingly important impediments to trade which the trade community has a legitimate interest in addressing. On the other hand, the trade community arguably has little interest in using trade laws to overturn legitimate environmental laws that are not discriminatory and are not disguised barriers to trade.

Obviously, a disguised barrier is a measure whose stated purpose does one thing, but which is intended-by its authors to do another thing. Thus, as was done in the NAFTA technical regulations provisions, the proper test for a disguised barrier should be a test that determines whether the measure was intended to protect the environment or to affect trade. While the NAFTA parties accepted that test (NAFTA does not permit challenges to any technical regulations with a legitimate environmental objective unless they are discriminatory), the GATT negotiators from nations other than the United States simply took the old international law view that one cannot judge the intentions of a nation. A number of them commented that such a test would be impossible to implement. Because they could not develop a direct

test to determine whether a measure is in fact a disguised barrier to trade, the negotiators chose the tests described below, which arguably go too far in their ability to challenge legitimate environmental laws. The seriousness of this overreaching, however, depends on the reach of the test and the particular measures subject to attack. When viewed in that light, I believe that the scope for challenges to legitimate environmental, sanitary and phytosanitary laws remains quite limited.

A. The Sanitary and Phytosanitary Provisions

Because there is a history of misuse of sanitary and phytosanitary measures as disguised barriers to trade (though mostly non-environmental measures), even the NAFTA, in Chapter Seven, permitted challenges to such measures if they do not meet certain tests including a science based test. The GATT language is similar to the language adopted in the NAFTA.

The Final Act sanitary and Phytosanitary Agreement provides in the preamble that "no Member should be prevented from adopting or enforcing measures necessary to protect human, animal or plant life or health, subject to the requirement that they are not applied in a manner which-would constitute a means of arbitrary or unjustifiable discrimination between Members where the same conditions prevail or a disguised restriction on international trade." The preamble then refers to the importance of international standards and the desire to further the harmonization of standards, but limits this language by the phrase "without requiring Members to change their appropriate level of protection of human, animal or plant life or health." The ability of a nation to set its own level of protection is reaffirmed in paragraph 11 and in a footnote to paragraph 11.

Thus it appears that a nation is free to set its own level of protection and that the zero risk level provided for in the Delaney Clause (or whatever new level of risk is set if the Delaney Clause is amended) is not subject to attack. Implementation of that level of risk is, however, subject to challenge.

A sanitary and phytosanitary measure may only exceed an international standard, guideline or recommendation, if there is "scientific justification" for that measure. A footnote to paragraph 11 which sets the "scientific justification" standard states that "there is a scientific justification if, on the basis of an examination and evaluation of available scientific information in conformity with the relevant provisions of this Agreement, a Member determines that the relevant international standards, guidelines or recommendations are not sufficient to achieve its level of protection." As with NAFTA, the parties must base their measures on a risk assessment (paragraphs 16-20). Also as with NAFTA, where relevant scientific evidence is insufficient, a party may base its measure on the available pertinent evidence (Paragraph 22).

The question raised by the requirement that a party show "scientific justification" for a sanitary or phytosanitary measure is of significance if it adds a new test that is more liberal than the test—usually whether a measure is "arbitrary or capricious"—that would apply if a challenge were made in a U.S. court. Unless that is the case, a challenge to a measure in a U.S. court would be preferable to a party that does not like a measure because success in U.S. courts leads to the immediate repeal of the measure.[1] In addition, private parties may bring a challenge in a U.S. court, but not in a GATT proceeding. Moreover, the fact that GATT permits a "scientific justification" challenge is not necessarily significant because a plaintiff can also raise such a challenge in a U.S. domestic case arguing that the promulgation of a regulation (but not a statute) is arbitrary and capricious if that regulation was not based on adequate scientific evidence.

Arguably what a GATT challenge adds is the ability to challenge a measure without granting the deference owed to a decision under a domestic "arbitrary and capricious" standard and to challenge statutes and not just regulations (although specific standards are normally set by regulation so that this latter power may not be significant). Generally, granting deference to a decision is important to the government in an arbitrary and capricious case so this difference is not unimportant. Its importance, however, is somewhat diminished by the provision in the Final Act permitting a nation to base a decision on incomplete evidence and the complete deference given to the nation's decision to set its own level of risk.

In general, these "scientific justification" provisions are not very different from the standards in the NAFTA. In the NAFTA implementing bill, however, the govern-

[1] A successful GATT challenge would lead only to sanctions unless Congress changes a federal law, the executive branch repeals a regulation after proper notice and comment, or the President successfully challenges a state law in court. A successful GATT challenge, however, would lead to pressure to repeal the challenged law or regulation and to stop the enactment of similar laws and regulations.

ment clarified the scientific justification standard to state basically that a measure has only to be based on evidence gathered scientifically. It is somewhat unclear whether that is binding in the NAFTA context, but such legislation would not be binding in the GATT context.

The other critical basis on which a party can bring a challenge to a sanitary or phytosanitary measure is by utilizing the requirement that "such measures are not more trade restrictive than required to achieve their appropriate level of protection, taking into account technical and economic feasibility." A footnote to this provision explains that "for purposes of paragraph 21, a measure is not more trade restrictive than required unless there is another measure, reasonably available taking into account technical and economic feasibility, that achieves the appropriate level of protection and is significantly less restrictive to trade."

The new language, however, still permits a challenge to valid sanitary and phytosanitary measures if there is an alternative measure that meets the above tests, but the tests are somewhat complex and will be difficult to meet in most cases.

In conclusion, while the sanitary and phytosanitary provisions are not ideal, they are not significantly worse than the provisions in the NAFTA. They require challenges that will be complex and time consuming and must be brought by governments. With respect to the United States, they will be brought against measures that have had to survive rigorous challenge under domestic law. Moreover, with respect to the sanitary and phytosanitary measures about which the environmental community cares the most, standards setting pesticide residues, a successful challenge leads directly to sanctions not repeal of the law or regulation, and while this would lead to pressure to overturn a law or regulation or to prevent enactment of a similar law or regulation, it is possible that the Congress and the President would resist the pressure to repeal the law or regulation to remove such sanctions.

B. Technical Regulations

The technical regulations language adopted in Geneva, like the language in the NAFTA, does not provide a nation with as many grounds to challenge a technical regulation as it permits for challenges to sanitary and phytosanitary standards. Thus, the technical standards language does not require a nation to justify the scientific basis for a technical regulation. The language does, however, like the sanitary and phytosanitary provisions, permit challenges to legitimate environmental laws if they are "more trade restrictive than necessary."

As with the sanitary and phytosanitary agreement, the preamble to the Agreement on Technical Barriers to Trade (the TBT Agreement) begins by "Recognizing that no country should be prevented from taking measures necessary * * * for the protection of human, animal or plant life or health, or the environment * * * at the levels it considers appropriate, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade * * *"

As indicated above, the TBT Agreement then utilizes a "no more trade-restrictive than necessary" test to judge the legitimacy of a law or regulation. Specifically, it states that

> "Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfill a legitimate objective, taking account of the risks non-fulfillment would create. Such legitimate objectives are, inter alia, * * * protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, inter alia, available scientific and technical information, related processing technology or intended end uses of products."

Unlike with the sanitary and phytosanitary provisions, there is no footnote explaining this test.

This language permits challenges to environmental laws on a much broader basis than NAFTA (unless the law is discriminatory under NAFTA, if a law has a legitimate environmental purpose that is a complete defense). The grounds under which challenges can be brought are even broader than under the pre-Uruguay Round GATT since the GATT language did not include the words "with the effect of" in the test.

The impact of this language, however, is limited by the definition of "technical regulation." Under the TBT Agreement, a technical regulation is one that "lays

down product characteristics."[2] It also may "include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method." Thus, and this is critical to understanding the reach of the TBT Agreement, the only regulations covered by the TBT Agreement, and thus subject to attack as inconsistent with the TBT Agreement, are those that affect product characteristics. As a result, environmental laws like the Clean Air Act, Clean Water Act and the regulations promulgated thereunder are not subject to review under the TBT Agreement.

There are several other provisions in the TBT Agreement that facilitate legal challenges to environmental laws. The first is the requirement in paragraph 2.3 that technical regulations "shall not be maintained if the circumstances or objectives giving rise to their adoption no longer exist or if the changed circumstances or objectives can be addressed in a less trade restrictive manner." The second relates to harmonization and international standards. Paragraph 2.4 requires that international standards be used "except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfillment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems." The "for instance" phrase seems very narrow and raises the question whether a country can really choose its own level of protection where there is an international standard.

In conclusion, the TBT language appears to permit broad challenges to valid technical regulations. The potential impact of these challenges again depends on whether the new Uruguay Round test adds significantly to the legal arsenal of those who wish to challenge valid environmental laws. This will depend primarily on whether there are "less trade restrictive measures" to the measure being challenged and on how this test is interpreted. This broad basis to challenge technical regulations is, moreover, substantially mitigated by the narrow reach of the definition of technical regulations. The TBT provisions do not permit a nation to argue that a market-based incentives is less trade restrictive than a command and control regulation (marketbased incentives generally do not regulate product characteristics), and they also do not include bans on products. Covered regulations subject to attack clearly include regulation of product characteristics as well as labelling and packaging laws and regulations. In the grey area would be a ban under the U.S. Endangered Species Act of, for example, tortoise shell glasses—is the ban a product ban or does it regulate a product characteristic?[3] Challenges to technical regulations, moreover, are limited by the "product characteristic" requirement because the tie to product characteristics appears to require challenges on a product-by-product basis and not a general challenge to a law such as Proposition 65 (labelling requirements under Proposition 65 for a particular product could be challenged under the technical regulation provisions).

C. Tuna-Dolphin and International Treaties

Prior to the Uruguay Round Agreement, a GATT panel had ruled that the U.S. restrictions on the import of tuna caught by Mexican fishermen setting on dolphin violated the GATT because the restriction related to a production method or process (how tuna are caught) rather than to the tuna itself, the product being imported. The Uruguay Round Agreements do not reverse (or technically confirm) this decision. Moreover, the Uruguay Round Agreements strengthen the dispute resolution process by preventing a single country from vetoing a panel decision. This latter provision, however, should not be overstated in importance since in the tuna/dolphin case the United States thwarted the decision by political pressure, not by a veto. In addition, no country has unilaterally vetoed a panel decision since the mid-1980s, and in the past when the U.S. vetoed or said it would veto a GATT panel decision, it often negotiated a settlement with the complaining country. Nevertheless, this change in the dispute resolution process is important. As is discussed later in this testimony, the only positive movement on this front is that the WTO committee that

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[2]The Agreement then adds the words "or their related processes and production methods." This language has historically been limited to process and production methods that affect product characteristics only.

[3]Currently there are two GATT challenges to U.S. environmental laws. First, the European community has challenged U.S. CAFE standards on the ground that they discriminate against European cars. The U.S. takes the view that this could not be turned into a challenge to a technical regulation since CAFE standards affect fleet makeup, not a product characteristic. Second, Venezuela has challenged the new reformulated gasoline rule. Arguably, the formulation of gasoline is a product characteristic although, as I understand it (and my understanding is not complete), the Venezuela complaint is that some of its oil doesn't formulate well and thus the U.S. may argue that this cannot be brought as an attack on a product characteristic.

probably will be established to consider the future of trade and environment issues is likely to consider process and production methods.

Unlike the NAFTA, the Uruguay Round does not address the interaction between international environmental agreements and the GATT. This issue will also be considered by the trade and environment committee. Generally most GATT experts feel that a signatory to an international environmental agreement could not challenge the international environmental agreement on the ground that it is inconsistent with the GATT, but that a non-signatory to the international environmental agreement could raise such a challenge.

D. Restrictions on Subsidies

Subsidies for environmental protection had been an issue in earlier Uruguay Round negotiations and had been rejected in earlier drafts of the Uruguay Round Agreement. They again became an issue when the Mexican government successfully lobbied for a limited exemption from the GATT prohibition against government subsidies. Under the Agreement, governments payments to assist the adaption of existing facilities to new environmental regulations are exempt from trade penalties if they meet certain criteria. The most important-of these criteria are: the subsidy must be open to-all firms; it must be a one time nonrecurring measure; it must be limited to 20 percent of the cost of adoption; and it cannot cover any manufacturing cost savings. Although there are some potential risks to the trading system from misuse of subsidies, and some questions about the economic benefits of subsidies, subsidies for the cost of retrofiting an existing plant to meet environmental requirements will speed up much needed conversion of old polluting facilities to ones with better pollution control and thus appear to be well advised and worthy of support.

E. Production and Process Methods and Unilateral Action

The obverse side of the issue of domestic standards is whether a country should be allowed to restrict the import of industrial goods (animal and plant products are discussed separately below) because they were produced in the country of export without adequate environmental standards. Differing national environmental standards can have a profound effect on international trade because production will be cheaper in countries with lax environmental standards, potentially giving exports from those countries a cost advantage in the importing country. Weaker environmental standards also encourage a flow of investment to the country with the lax standard. Nevertheless, the position of most trade policymakers and international economists is that they oppose a country's restricting imports from a country with lax standards because they argue that policymakers should not interfere with the market advantage gained by a country that is willing to tolerate higher levels of pollution, and because they believe that the United States would not tolerate a similar interference with its exports. Finally, they and many countries, particularly developing countries, describe such action as unilateral action that unacceptably interferes with the sovereignty of nations.

The position of environmentalists in this context is different. They argue that the market advantage of the country with the lax standards results from a breakdown in the ability of market mechanisms to include the costs of pollution in the price of a product, they are concerned about cross-border effects of pollution resulting from the lax standards, and they generally would like to see more effective environmental laws everywhere.

There are great practical difficulties, however, facing a nation which attempts to develop a scheme to restrict the import of goods from nations which do not meet the importing nation's own environmental protection standards or which fail to enforce their own environmental laws adequately. This can be seen clearly by examining how the United States goes about regulating industrial discharges of pollutants.

In the United States, the focus of the effort to control pollution is at the plant level through either setting discharge limitations or by requiring specific types of pollution control equipment. Because the age and technical sophistication of the existing plant base often differs dramatically both within and between industries, a set of regulations that required all plants to respond in the same manner to a set of regulations could wreak havoc, forcing many facilities out of business. Moreover, the ability of a new facility to meet discharge limitations is often superior to the ability of an old facility to retrofit to meet such standards. Thus, in the United States there is a multifaceted approach to regulating pollutants that takes into account these differences.

The United States Clean Water Act ("CWA"), for example, required that industrial facilities meet four different standards depending on the age of the facility and the type of pollutant involved. One standard became effective July 1, 1977, another July 1, 1984, the third became effective between 1984 and 1989, the fourth applied spe-

cial, more rigorous standards to new facilities and to certain modifications of existing facilities. similarly, compliance schedules in the Clean Air Act Amendments of 1990 run for as long as twenty years (these are extensions of earlier deadlines which were not met). In some cases it is likely that there will be further extensions of these schedules.

Thus, U.S. environmental laws tend to set relatively long-term compliance schedules that are designed to enable facilities to achieve compliance on a step-by-step basis. This flexibility, however, raises great practical difficulties for those arguing that there should be restrictions on trade from foreign facilities that do not meet U.S. standards. First, as indicated above, there often are a series of standards, not one standard, that are being applied under a prolonged implementation schedule. Second, as the CWA example demonstrates, it would be far too disruptive to foreign production, particularly in developing countries, to mandate that they immediately achieve U.S. pollution control technology levels. At a minimum, a long period of transition would be necessary. Third, some U.S. standards are based on the ambient conditions in the area around specific production facilities (in other words the amount of background air or water pollution), and these standards at least cannot be translated to areas with different background environmental conditions. Fourth, U.S. law requires owners and operators of industrial facilities to clean up contamination regardless of fault, even in situations where the owner or operator of the facility did not cause the contamination. This requirement is more of a political choice than an economic one since there is no economic reason why the cost should be allocated to the innocent owner or operator of the facility.

In addition, such an approach could create a nightmare of trade restrictions. If the stricter pollution standards for an industry could be used to justify a trade restriction, then each industry in every country would have to be compared to see which had the stricter pollution control level. For example, if the Japanese semiconductor industry had stricter standards than the U.S. industry, Japan could apply restrictions on the import of semiconductors. If a U.S. specialty chemical industry had stricter standards than its counterpart in Japan, then the United States could apply restrictions. There would be no end to such comparisons.

Thus, as both a practical and policy matter, trying to implement unilateral, blanket restrictions on trade because the environmental standards in one country are not as strict as those in another would be counterproductive. Nevertheless, different standards unquestionably have an impact on trade patterns, and lax environmental standards in an exporting country harm the competitiveness of U.S. products competing with imports from that country and encourage, to at least some extent, U.S. industries to shift their production abroad. Some of this harm results from the failure of market mechanisms to measure accurately the cost of pollution in the cost of production of goods. As a result, the question remains whether there are bilateral and multilateral approaches to this problem that can be implemented fairly and without triggering a trade war.

One answer lies in addressing some of these issues through existing bilateral and multilateral agreements already in force such as various wildlife and fisheries treaties and the Montreal Protocol. They require steps to be taken that improve environmental protection throughout the world, and thus raise the environmental standards of many of the United States' competitors.

Most of these agreements are also likely to be revisited again with the goal of strengthening their provisions. To address the competitiveness issues described above, one goal of the United States with respect to most of these agreements should be to seek minimum standards that protect the environment and, by reducing disparity in standards, reduce trade distortion and foster U.S. competitiveness. Consistent with the approach in U.S. law, these minimum standards can and should be implemented over a reasonable period of time based on their cost and their level of difficulty. Moreover, consistent with existing agreements such as the Montreal Protocol on CFCs, it should be a goal of U.S. policy in most situations to make the agreements enforceable through trade retaliation against nations that do not comply with an agreement or, in the case of multilateral agreements, nations that do not become signatories and refuse to implement equivalent standards.

Second these issues can and are likely to be addressed multi laterally through the environment committee of the WTO setting, for example, minimum standards for emissions of specific hazardous substances. If that is not successful, separate international environmental negotiations should be considered.

Third industrial process and production methods should be separated from production and process methods that affect the high seas. Here permitting unilateral action to protect marine resources like dolphin would have no impact on the territory of another nation. Moreover, the international community has always treated industrial and wildlife issues differently. There are in fact over 100 international

wildlife treaties while there are virtually no treaties regulating industrial process and production methods. Finally, as in the case of tuna/dolphin, trying to prevent the United States from protecting dolphin by forbidding tuna is simply extremely unlikely to succeed politically and failure to separate out issues affecting the high seas and industrial process and production methods will lead to confusion that will make it difficult to resolve industrial issues in the manner described in this memorandum.

Fourth, the United States could consider seeking an amendment to the GATT to authorize trade barriers to enforce national regulation aimed at ameliorating environmental harm in the global commons, on condition that the country imposing the condition "pay" for the action with compensation elsewhere. The idea is similar to Article XIX of the GATT which permits Contracting Parties temporarily to raise their customs duties to allow for adjustment to import pressures, provided they "compensate" the adversely-affected exporters with offsetting trade concessions—a sort of self-imposed retaliation for their import barriers. A suggested approach in the environmental area would authorize environmental barriers to continue for a limited period without compensation, subject to the parties' convening a working group to study the reasons behind the barrier and, hopefully, to negotiate an end to the allegedly offensive practice.

While it might at first be considered harmful to environmental interests to allow such barriers only at sufferance, they may provide a useful middle ground since considerations of national sovereignty and free-trade pressures may make any other approach difficult to justify or even administer. Used strategically, such temporary barriers might be an engine to bring about improved environmental management, particularly with respect to the global commons in which all nations have an interest.

Fifth, the United States could address lax environmental standards that affect competitiveness, but not the international environment. Notions of national sovereignty make this a far more difficult task than addressing issues with effects that extend beyond a country's borders. Nevertheless, there are several ways that the United States can address such issues.

One approach that the United States could take to ameliorate competitive concerns is through the regulation of U.S. investment in other countries. In the trade and environment context, it may well be acceptable and appropriate to regulate cross-border investment decisions since such regulation applies to nationals of the country imposing the regulation, not of the country with the weaker environmental standards. In addition, as is indicated above, investment in new plants and in plant upgrades is treated differently in the United States than regulation of existing facilities. Thus it would be a relatively simple extension to place restrictions on new investment to protect the environment and to ensure that investment is not made in other countries because they are "pollution havens."

This issue is being addressed seriously in the business community. Some companies have already determined that all their anew investments worldwide should meet the same standards. Others are considering worldwide minimum standards. Following the initiative of these companies, it would be logical for the United States to suggest bilateral and multilateral negotiations to establish investment standards. Recent studies conducted in connection with NAFTA indicate that most investments in Mexico that are likely to result from NAFTA will not, in fact, be stimulated by weaker environmental standards or enforcement,[4] and thus new environmental investment standards, while removing the threat that the "pollution haven" issue raises to free trade negotiations, should not significantly reduce investment in developing countries. At the same time, developing countries will receive the benefit of environmentally sound investment.

There are many potential sources of environmental investment standards. In bilateral cases, the agreement could simply require that investment be made consistent with the environmental standards of both countries. This standard could be applied to investment between the countries or to all foreign investment in the countries. In multilateral negotiations, a similar standard could be used or a separate environmental negotiation could be held to establish minimum standards.

II. PROTECTING THE ENVIRONMENT THROUGH TRADE

Increased trade and increased economic growth can of course adversely affect the environment by increasing the use of natural resources and the amount of waste and pollutants generated by industry. Increased prosperity, however, may also be

[4] Grossman and Krueger, Environmental Impacts of a North American Free Trade Agreement (October, 1991).

a precondition for environmental protection in many developing countries. Even in developed countries, it is easier to pass strong environmental laws and institute strong environmental measures in times of prosperity compared to times of recession. The question before Congress is what steps need to be taken to ensure that the increased prosperity from trade translates into better protection of the environment.

One potential benefit of trade on the environment would arise if the WTO or nations in general begin to address the process standards questions in the manner recommended above. Setting process and production standards is likely to lead to minimum environmental standards and this would be a major plus for the environment.

A second benefit could come from actions taken by a permanent trade and environment committee established by the WTO. If, as expected, there is a trade and environment committee established within the WTO, it presents a potential place to fix the imperfections in the sanitary and phytosanitary and technical regulation sections after completion of the Uruguay Round.

A third benefit will come from the Committee on Environmental cooperation (CEC) established by the Environmental Side Agreement to the NAFTA. Although the CEC has its imperfections the fact that three sovereign countries agreed to establish a committee that has the power to oversee the implementation of environmental laws is revolutionary. It is critically important that Congress pay close attention to the establishment and actions of the CEC.

Finally the trade and environment debate presents opportunities to raise new funds for worldwide environmental protection. It is costly, particularly to developing nations, not only to install pollution equipment, but also to protect natural resources and to build the infrastructure necessary to ameliorate the impact of increased development resulting from freer trade. As indicated above, the industrial nations will have to bear some of this cost. It would be advisable for the international community to address this issue directly as was attempted, with relatively little success, at the Rio Summit.

Proposals were considered this year in connection with the NAFTA that a customs duty be established among the NAFTA parties with the funds to be used to lessen the impact of the agreement on the environment and workers. This type of proposal should be given serious study as soon as possible as a potential way to ameliorate the impact of trade on the environment. A one-half of one percent duty on all imports by all countries, for example, would have little impact on trade patterns because the duty would be small enough to have little impact on the competitiveness of goods. Such a fee would raise approximately 26 billion dollars, assuming world trade of approximately 5.2 trillion dollars.[5] As an alternative, a percentage of the duties already being assessed by nations could be allocated to the fund.

Such a duty would do more than benefit the environment. It might also provide the last and most difficult key—ameliorating negative impacts on the environment in developing countries—necessary to make the trade and environmental community more confident that development is sustainable and thus to assure cooperation between these communities in resolving trade and environmental issues.

Senator KERRY. Thank you very much. We will follow up on a few questions. Rob.

STATEMENT OF ROBERT F. HOUSMAN, STAFF ATTORNEY FOR THE CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW, UNITES STATES, ON BEHALF OF THE SIERRA CLUB AND DEFENDERS OF WILDLIFE

Mr. HOUSMAN. Today, I appear on behalf of the Sierra Club and Defenders of Wildlife. I want to first focus very briefly on what I believe is our most pressing trade and environment issue, and that is the Uruguay Round's final agreement. We have a two-part test to determine if the final agreement is good for the environment. The first part is whether or not the final agreement promotes democracy, because, as the chairman noted earlier, democracy goes hand in hand with environmental protection.

[5] Although this figure seems very large, it is only a small proportion of the aid that was considered necessary at the Rio Summit to ensure sustainable development in the developing world.

We believe the agreement falls short here. Under the agreement's terms, citizens would be denied not only the right to appear before panels, but would also be denied information from and about panels. This would be a closed door, secretive system. We believe that Congress and this committee should pay serious attention to this fact.

Our second test is environmental sustainability. It has two basic parts. First, the agreement must not endanger high U.S. health and safety standards. Regrettably, this agreement has a series of provisions that do just that. In essence, I want to be Senator Danforth's alter ego. Earlier he expressed concern that the environmental rules would harm free trade. In contrast, I fear that some of these free trade rules might harm our environmental laws.

For example, the "least trade restrictive" test occurs in both the sanitary and phytosanitary—SPS—and technical barriers to trade—TBT—rules. I differ from Mr. Berlin with regard to this test. I think this would be a substantial tool for those who wish to strike down environmental protections.

I also believe that the TBT rules on process standards could endanger such vital U.S. laws as the Driftnet Fisheries Enforcement Act and the Clean Air Act.

Moreover, because the agreement requires the U.S. Federal Government to take measures to bring State and local governments into conformity, it could also compromise environmental protections at the sub-Federal level.

The dangers are also not limited to within our national borders. Unlike the NAFTA which provided additional protections for international environmental agreements, the final agreement would do no such thing. Vital international environmental agreements such as the Montreal Protocol, the Basel Convention, and CITES would be placed at risk. Essentially, the final agreement rewards our multilateralism by placing it at risk.

The threats here are also real. There have been at least 13 challenges or threatened challenges to U.S. environmental health and safety laws in just the last 3 years.

The second half of our environmental sustainability test requires that the final agreement must provide safeguards to ensure that expanded trade will be sustainable in nature. Unlike the NAFTA, the final agreement fails to address the two issues that you eloquently raised in your opening statement Chairman Kerry; namely, capital flight and industrial relocation based upon differences in environmental standards. We believe this is a serious flaw.

Nor does the agreement give us the luxury of looking to some future trade and environment negotiation to correct these flaws. The final agreement does not include the much heralded and promised Green Round. Nor does it even commit to a committee to address these trade and environment issues. While the agreement does commit to a work plan, we have serious concerns about whether the work plan will be able to move us toward an environmental reform agenda.

Essentially, while the failure of the current GATT to address environmental issues can be chalked up to basically benign neglect—environmental issues were not pressing in 1947—no such justification is available for this agreement.

Not too long ago, I had the opportunity to hear a senior administration official make an impassioned plea for environmental support for the final agreement of the round. This plea provided "[we] should support the round so that the administration can stop painting the walls that other administrations have erected and start building their own trade and environment framework."

Unfortunately, the very architecture of this final agreement would appear to impede the development of trade rules that would advance environmental health and safety protections. As a condition for congressional approval of the final agreement, the administration must do more than offer a few splashes of green paint. It must articulate a plausible strategy for fostering sustainable development through expanded trade.

I would like to deviate from my prepared testimony and offer some brief comments as to how I think this process of developing mutually reinforcing trade and environment rules and policies can move forward. Because these are essentially "back of the napkin" thoughts, I offer them only in my personal capacity.

First, internationally, while the work plan is flawed it is the only game in town. Congress needs to be both vigilant and aggressive in ensuring that the direction the plan takes is toward environmental reforms.

Second, the Washington whispers are now loud about a moratorium on trade challenges during the process of the work plan. I think this is an excellent idea for two reasons: one, it would protect our environmental laws while this potentially time consuming process moves forward; and, two, it would give impetus to other nations to negotiate expeditiously and in good faith.

Third, I think Congress needs to push for the rapid democratization of the international trade system. Senator Kerry, you expressed this very eloquently during your discussion concerning China and the ill effects of authoritarian regimes on the environment. What we have now at the international level is essentially an authoritarian, closed-door, international trade regime that exists largely independent of democratic national governments. Progress on environmental reforms will only occur after the democratization of this system has taken place. Democratization needs to be our highest priority.

Turning to the domestic side of the debate, first, when I testified before you last I mentioned the need for a trade and environment advisory committee. To the administration's credit, it is moving forward toward the creation of this committee; however, no such committee is yet in place. One needs to be put in place, and now, while we are going through this work plan.

Second, as you consider future congressional authorizations for trade agreements, I think Congress needs to look seriously at balancing the need for democracy in our own domestic trade policymaking, with the need to have effective trade policies.

Third, we need to jump-start international efforts. Again, as I testified before you last time, I said the OECD is just mired. Nothing has changed there. One way to jump-start these efforts is to show that we are serious about unilateral measures and our ability to take them. Two things here: First, the framework that was discussed before you earlier noticeably lacks any sort of box, if you

will, for unilateralism dedicated or directed at multilateralism. In other words, building a multilateral regime, sometimes, you have to act alone. I think that needs to be corrected. I would also remind you that the framework outlined here today is only for discretionary measures, not nondiscretionary measures that are contained in laws.

Two other quick notes: Science is rarely perfect, so if we are going to rely heavily on science we should not let it hamper us. And also, I think Mr. Berlin is right, there are some things that will not be justified by science but more closely by Kantian imperatives.

Finally, let me return to the NAFTA for a moment. NAFTA reminds me of a barnraising. You build a framework, you have a party, and everybody thinks that it is done. But the hard work has just begun. I ask that Congress, and you in particular, remain vigilant throughout the NAFTA implementation process because all we have is a framework. The roof and the walls still need to be built.

Thank you.

[The prepared statement of Mr. Housman follows:]

PREPARED STATEMENT OF ROBERT HOUSMAN

Chairman Kerry, Members of the Subcommittee, thank you for the opportunity to testify before you concerning the environmental ramifications of the Final Agreement (the Final Agreement or the Agreement)[1] of the Uruguay Round of the General Agreement on Tariffs and Trade (the GATT).[2] My name is Robert Housman. I am a Staff Attorney with the Center for International Environmental Law, and an Adjunct Professor of Law at the American University's Washington College of Law. I appear today on behalf of the Sierra Club and the Defenders of Wildlife (Defenders).

Before moving to our analysis of the Final Agreement, I believe it is necessary to put the issue this hearing seeks to address in context. The issue here is not whether free trade is good or bad. We support the general principles of free and fair trade. Nor is the issue even whether free trade is good or bad for the environment. Indeed, under the right conditions, expanded trade and economic growth can be environmentally beneficial. The issue I will address today is whether or not this particular agreement—the Final Agreement of the Uruguay Round—is good for the environment This question is vital because environmental degradation has real economic costs—both to public health and to natural resources—that can undermine the very benefits that expanded trade is intended to bring. Environmental degradation also has real costs in human terms cancer, lung disease, hepatitis, food poisoning. These human costs lower our standards of living—precisely the opposite effect that economic growth through expanded trade is intended to have.

Within this context, the goal of my testimony today is to provide you "just the facts" while avoiding the rhetoric and hyperbole that has plagued past discussions over the environmental impacts of trade agreements.

I. THE STANDARD FOR JUDGING THE FINAL AGREEMENT

The Sierra Club and Defenders believe that before the Final Agreement can be considered acceptable to the United States Congress and the American people it should pass two critical tests. First, the Agreement must be able to stand up to the basic principles of democracy. Second, the Agreement must promote environmentally sustainable development. Specifically, it must preserve our high U.S. environmental, health and safety standards and it must protect the global environment from unfair international competition on the basis of lax environmental standards and over-exploitation of natural resources. Unfortunately, based on the information now available to us, the Final Agreement fails both of these tests.

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[1] Trade Negotiations Committee, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade negotiations, Dec. 15, 1993, MTN/FA, UR-93.02461 [hereinafter Final Agreement]. All citations to the various components of the Final Act in this testimony refer to this text.

[2] Opened for signature Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 187.

Many of you may experience a sense of deja vu as you listen to our remarks. Environmentalists raised similar concerns regarding the North American Free Trade Agreement (the NAFTA).[3] Regardless of how you voted on the NAFTA, we urge you to take a close look at the Final Agreement. Environmentalists are in broad agreement that the Final Agreement is substantially more threatening to democratic processes and to sustainable development than the NAFTA.

II. THE EROSION OF DEMOCRATIC PRACTICES

Our first test is a simple one. The Final Agreement must promote democracy. This test requires that in order to pass muster the Final Agreement must provide citizens with the ability to have information about and participate in decisions that affect their interests. We believe the Final Agreement fails this test.

Democratic practices are essential to environmental protection because only free people can hold their governments accountable to pass good environmental, health and safety laws, to enforce those laws, and to build the necessary environmental infrastructure to compliment those laws. Our experiences with the former authoritarian states of Central and Eastern Europe demonstrate the point.[4] Moreover, as President Clinton recently recognized in his State of the Union address "democracies make the best trading partners." Yet, while we seem to recognize the value of democracy to both environmental protection and free and fair trade, we are rushing to establish an international trading system that weakens these very principles of democracy.

The most important democratic failures of the Final Agreement occur within its dispute resolution provisions.[5] These provisions would provide the ground rules for deciding disputes that will arise concerning, among other things, U.S. environmental, health and safety laws. Under the Final Agreement's proposed rules citizens can neither appear before panels nor submit information to panels.[6] The procedures at the appellate level are similarly undemocratic.[7] The Final Agreement not only denies citizens the ability to participate in decisions, but it also denies them the right to have information about these decisions. For example, the Final Agreement explicitly prohibits members of the public from attending the hearings of dispute settlement panels or the standing appellate body.[8] The Final Agreement also explicitly prohibits the public from having access to the pleadings of the parties to disputes.[9]

There are only two ways in which the public can cut through the Final Agreement's shroud of secrecy. First, a party may make its own submissions public, but in so doing it must protect the other party or parties' arguments.[10] Operating under the current GAIT, the United States Trade Representative (USTR) has repeatedly requested that other parties challenging U.S. environmental, health and safety make their briefs public. Not once has another party agreed to this request. There is no reason to believe that this pattern will change. USTR has made copies of redacted U.S. briefs available to the public in a number of cases.[11] While we appreciate USTR's efforts, our experience with these redacted briefs is that they are of little or no use. Imagine reading a baseball scorecard that only lists the performance of one of the two teams; there is no way to know who is playing and how the game is going.[12]

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[3] North American Free Trade Agreement Between the Government of the United States, the Government of Canada, and the Government of the United Mexican States, Dec. 17, 1992, 32 I.L.M. 289, 605 (1993) [hereinafter NAFTA].

[4] See, Chris A Wold & Durwood Zaelke, "Promoting Sustainable Development in Central and Eastern Europe: The Role of the European Bank for Reconstruction and Development," 7 Am. Univ. J. Int'l L. & Pol'y 559, 561 (1992) ("The state of the environment in Central and Eastern Europe is the epitaph of centrally planned economies. * * *").

[5] See, generally, Final Agreement, Annex 2, Understanding on Rules and Procedures Governing the Settlement of Disputes, 1-25 [hereinafter Understanding on Dispute Settlement].

[6] Understanding on Dispute Settlement, supra note 5, at Appendix 3, art. 2.

[7] Id., at art. 17.10.

[8] See id. at art. 17.10; Appendix 3, art. 3.

[9] Id., at art. 18.2; Appendix 3, art. 3.

[10] Id.

[11] See, e.g., USTR, Second Submission to the Panel on United States Taxes on Automobiles, Nov. 24, 1993 (public version); USTR, Rebuttal Submission of the United States to the Panel on United States—Restrictions on Imports of Tuna, undated (public version).

[12] For example, the redacted U.S. brief in the CAFE case begins: 5. [ ] As addressed below, there is no support in the General Agreement for this theory. See, Second Submission to the Panel on United States Taxes on Automobiles, note 11, at 2 (brackets and spaces in the original).

Second, a party may request that the other parties to a dispute make summaries of their submissions public.[13] Here again our experiences do not bode well. For example, under the Pelosi Amendment governments who want a loan from a multilateral development bank must make a summary of an environmental assessment public, or by law the United States cannot vote in favor of the loan.[14] The summaries that have been produced under the Pelosi Amendment for multi-million dollar megaprojects are often times little more than a page or two in length. We have no reason to believe that many of the same governments who supply these useless summaries will be more forthcoming in the trade context where the stakes in real dollars are much higher.

The inability of citizens to participate in, and have access to these panels both limits the work of citizens and nongovernmental organizations, and denies panels valuable expertise. This problem is compounded by the Final Agreement's failure to ensure environmental expertise in trade disputes over environmental, health, and safety standards. Even where the core issues in a dispute are environmental in nature, dispute panels would be made up of international trade experts.[15] The makeup of these panels would create an inherent bias against environmental, health and safety standards. While the Final Agreement does provide that panels may if they wish seek outside expertise and information, this is merely recognition of the evolving practice under the current GATT and not a major substantive advance.[16] The only new facet in the Final Agreement are the provisions in the TBT and SPS rules, which would allow panels to request the formation of technical experts groups to assist their deliberations.[17]

The undemocratic nature of the Final Agreement is also reflected in the proposed World Trade Organization (the WTO).[18] The WTO is a gathering of unelected diplomats who would have substantial powers in managing international trade and in setting the rules by which nations must play. The rules of participation for this WTO are as yet unwritten.[19] If the parties adopt rules of procedure that exclude citizens, as the other provisions of the Agreement suggest they will, then the WTO will be a new and unaccountable international bureaucracy standing between citizens and their ability to protect the environment and human health. As democratically elected representatives you should bear this danger in mind as you evaluate the Final Agreement.

Let there be no misunderstanding. If the Final Agreement is implemented trade panels and diplomats will sit in secret judgment over the democratically enacted environmental, health and safety laws of the United States and other nations. Citizens' eyes will be blinded, their ears covered, and their voices silenced. When democratic practices are eroded by international agreements, the law-making function exercised by democratically elected lawmakers—including this Congress—is weakened. Power is subtly, or not so subtly, transferred from the hands of legislatures accountable to their constituents, to diplomats accountable to heads of states. Environmentalists are deeply worried by this prospect. We believe that this issue merits the careful attention of this Subcommittee.

III. THE FAILURE TO ENSURE ENVIRONMENTAL SUSTAINABILITY

Our second test is environmental sustainability. This test has two parts. First the Final Agreement must not endanger U.S. environmental, health and safety laws. Second, the Agreement must provide the safeguards necessary to ensure that the increases in trade the Agreement will promote will not harm the quality of our environment. Here again, we do not believe the Agreement passes muster.

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[13] Understanding on Dispute Settlement, supra note 5, at Appendix 3, art. 3.

[14] 22 U.S.C. §262m-7.

[15] Understanding on Dispute Settlement, supra note 5, at art. 8.1. In providing guidance as to what individuals are "well qualified" to serve as panelists the Final Agreement lists the following as criteria: (1) prior service on a dispute panel; (2) prior service before a dispute panel; (3) prior service as a representative of a party at the GAIT or WTO; (4) prior employment in the Secretariat; (5) prior service as a senior trade policy official for a party; and (6) experience teaching or publishing on international trade law or policy. Id.

[16] See, "Thailand—Restrictions on Importation of and Internal Taxes on Cigarettes," (adopted Nov. 7, 1990), BISD (37th Supp.), at 201, 216-20 (discussing World Health Organization's submission to and appearance before GATT dispute panel).

[17] Final Agreement, Agreement on Sanitary and Phytosanitary Measures, chapter 11.4, at art. 36 [hereinafter Agreement on SPS]; Final Agreement, Technical Barriers to Trade, chapter III.5, at art. 14 [hereinafter TBT Text].

[18] Final Agreement, Agreement Establishing the Multilateral Trade Organization, chapter II, 1-14 [hereinafter WTO Agreement] (the name of the Multilateral Trade Organization has been officially changed to the World Trade Organization).

[19] See, e.g., id., at arts. 2-7.

A. Threats to U.S. Environmental, Health and Safety Laws

The first aspect of environmental sustainability is to ensure that our trade laws do not threaten existing and future environmental, health and safety laws. Regrettably, the Final Agreement is replete with provisions that place these laws in serious jeopardy. The worst of these are found in the rules on Technical Barriers to Trade (TBT).[20]

If the Final Agreement is implemented, the TBT rules will be applied in the vast majority of challenges to our environmental standards. The one notable exception would be challenges to U.S. food safety laws, which will be judged under the separate Sanitary and Phytosanitary (SPS) rules.[21] The Final Agreement's TBT rules would require that our environmental laws be "no-more trade restrictive than necessary. * * *"[22] Simply put, this language requires that each and every U.S. environmental law must be the least trade restrictive means to the environmental ends desired. In other words, if a trade panel, with no environmental expertise or citizen participation, but with the benefit of hindsight and operating in secret without the real world pressures faced by legislatures and regulators, can conceive a hypothetical, alternative less trade restrictive standard that it believes protects the environment, then the environmental law in question will be found to violate the Final Agreement.

By way of an analogy, imagine if the Supreme Court of the United States could reject U.S. government policies and programs in any instance where the program or policy could possibly be improved upon in any way.[23] Those engaged in the difficult business of writing law should take a close look before endorsing any agreement that would judge their work by the exacting yardstick of perfection with 20/20 hindsight.

The least restrictive to trade standard of review invites challenges to a host of our most vital environmental laws, including, but not limited to: (1) the Clean Air Act[24]; (2) the Marine Mammal Protection Act[25]; (3) the Endangered Species Act[26]; (4) the High Seas Driftnet Fisheries Enforcement Act[27]; (5) the Sea Turtles Amendment[28]; (6) the African Elephant Conservation Act[29]; (7) the Magnuson Fishery Conservation and Management Act[30]; (8) the Pelly Amendment[31]; (9) the Toxic Substances Control Act[32]; (10) the Federal Insecticide, Fungicide, and Rodenticide Act[33]; and, (11) the Forest Resources Conservation Act.[34]

Many of these same laws would also be endangered by the proposed TBT rules on process standards. Process standards regulate the manner in which products are made, as opposed to product standards, which regulate the characteristics of the actual products. The current GATT text is silent on the product/process distinction, however, it has been interpreted to prohibit process standards. The Final Agreement is troubling because it directly addresses the process/product issue, and does so in a manner that is less than helpful. Under the proposed TBT rules, process methods that relate to the characteristics of products (such as good manufacturing or laboratory practices requirements) would be allowable, however, all other process standards would not.[35]

Neither the High Seas Driftnet Fisheries Enforcement Act's prohibitions on the use of driftnets,[36] of the Marine Mammal Protection Act's limits on the use of purse seine nets in the Eastern Tropical Pacific Ocean,[37] would seem to fall within the categories of allowable process standards. As these examples show the TBT provisions on process standards would jeopardize a wide range of U.S. environmental,

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[20] See, generally, TBT Text, supra note 17.
[21] See, generally, Agreement on SPS, supra note 17.
[22] TBT Text, supra note 17, at art. 2.2.
[23] In reality, recognizing that regulators and legislators are better qualified to make these decisions, the Supreme Court gives a great deal of deference to their decisions. See *United States* v. *Carolene Prods. Co.*, 304 U.S. 144 (1938) (deference to legislative decisions); *Chevron, U.S.A., Inc.* v. *NRDC, Inc.*, 467 U.S. 837, 843 (1984) (deference to regulatory decisions).
[24] See, e.g., 42 U.S.C. § 7545(k)(s)(B).
[25] See, e.g., 16 U.S.C. § 1371.
[26] See, e.g., 16 U.S.C. § 1538.
[27] Pub. L No. 102-582, 106 Stat. 4900 (1992).
[28] 16 U.S.C. § 1537.
[29] U.S.C. §§ 4201-4245.
[30] See, e.g., 16 U.S.C. § 1825(a).
[31] See, 22 U.S.C. § 1978(a)(4).
[32] See, e.g. 15 U.S.C. § 2612.
[33] See, 7 U.S.C. § 136o.
[34] 16 U.S.C. § 488(b)(3), (5).
[35] TBT Text, supra note 17, at Annex 1, art. 1-2.
[36] See, supra note 27.
[37] See, supra note 25.

health and safety laws, including, in particular many of our wildlife conservation laws. Moreover, by directly speaking to the process standard issue, the TBT rules would make needed reforms to the process/product distinction far more difficult.

The Final Agreement's provisions on conformity assessments also raise serious concerns about the continued ability of the United States to protect its citizens and their environment.[38] A conformity assessment is the process by which an importing country certifies that products produced under other countries' environmental, health and safety laws also conform with its laws and can be sold on its markets. The potential for nonconforming products finding their way into the United States and harming our citizens or our environment makes it vital that the United States retain its power to effectively determine which products conform to U.S. standards.

Unfortunately, the Final Agreement would limit our ability to conduct these conformity assessments by requiring that our processes for such assessments "be not more strict or applied more strictly than necessary to give the importing Member adequate confidence that products conform with the applicable technical regulations or standards, taking account of the risks non-conformity would create."[39] While this standard may seem innocuous at first glance, the term "necessary" in trade jurisprudence generally means 'least trade restrictive."[40] The application of a least trade restrictive test in judging U.S. conformity assessments would seriously hinder our ability to protect our citizens and their environment. Under this standard not only would trade panels be able to determine what procedures are "necessary" to give U.S. citizens the confidence that they are being protected, but these panels would also have the ability to determine what constitutes a significant risk to U.S. citizens that may justify more strict assessments. In other words, these panels would have the right to tell us what we should be afraid of and what we can do to ameliorate those fears.

The TBT text's provisions on harmonization are also troubling. For example, the Final Agreement would commit the United States to using international standards as the basis for its environmental, health and safety standards.[41] Article 2.4 of the proposed TBT rules specifically provides that:

> Where technical regulations are required and relevant international standards exist, or their completion is imminent, Members shall use them, or their relevant parts of them, as a basis for their technical regulations except when such international standards or relevant parts would be ineffective or inappropriate means for the fulfillment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental problems.[42]

In general, international environmental standards are lower than U.S. standards. This is the lowest common denominator problem, where one holdout country can drag a standard down to its own inadequate level. U.S. standards also suffer internationally because we enter these standard setting fora alone. Other nations, with more integrated standards systems, use these fora to effectively block rush our standards. Thus, in setting new environmental standards the United States would have to begin its process at a level that is likely to be lower than where it would otherwise begin. Inevitably, this will put pressure on the United States to lower our environmental standards.

Further, where the United States chooses to depart from an international standard and take a more protective measure, not only would the United States have to provide notice of the departure to the other GATT parties, but it would also have to give these parties the right to comment on the proposed higher standard.[43] If the comments to date of other countries on our environmental standards are any guide, this provision is cause for concern. We are aware of no incident where another country has used trade rules to argue in favor of higher U.S. standards. However, the record of other countries using trade rules to argue against higher U.S. standards is replete.[44] If implemented, this requirement will place the United States in the untenable position of having to decide between turning a deaf ear to its most valued trading partners or having to lower its environmental protections.

The Final Agreement's SPS rules also raise serious concerns with regard to U.S. food safety laws. Although the Clinton Administration was able to secure some changes to the Agreement's SPS provisions, those rules would still jeopardize our

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[38] Text, supra note 17, at art. 5.1.2.
[39] Id.
[40] See, Thai Cigarettes Case, supra note 16, at 200-23.
[41] TBT Text, supra note 17, at art. 2.4.
[42] Id.
[43] TBT Text, supra note 17, at art. 2.9.4.
[44] See, infra notes 72-84 and accompanying text.

ability to ensure that the food we eat in the United States is pure and safe. First and foremost, like the TBT text, the SPS rules would require that our food safety laws be least trade restrictive.[45] One of the changes chat the Clinton Administration was able to secure seeks to clarify this least trade restrictive test to provide greater leeway for environmental protections,[46] however, the test itself is unchanged: least trade restrictive.[47] Moreover, in determining whether a food safety standard is least trade restrictive the SPS rules would require that the standard's health and safety protections must be weighed against its economic costs.[48] The end result of these rules is that any time a secretive panel made up of trade experts, second guessing U.S. food safety experts, can conceive of an alternative less trade restrictive standard that they feel ensures that the food the American people eat is safe, the standard our food safety experts felt was necessary will be in jeopardy.

The SPS rules would also require that all our food safety standards must be based upon scientific principles and the product of a risk assessment.[49] While scientific principles are vital to environmental policies and risk assessments are valuable tools for crafting environmental protections, such rigid requirements raise a number of serious questions that should not be left unanswered. First, and most importantly, it is unclear how much power the Final Agreement's scientific principles language would give trade panels to second guess the quality of science or play one set of science off another. Second, it is unclear how these requirements would apply where a standard is adopted as a political decision, even where a subsequent risk assessment confirms the risk the standard addresses. Third, it is unclear how these requirements would apply to food safety standards adopted by referendum or popular vote. Fourth, it is unclear whether state and local governments have the human and fiscal resources necessary to meet these rules and still maintain our generally high levels of safety. Finally, it is unclear how these rules would apply to standards that are based on consumer preference or ethical considerations.

The SPS rules on harmonization are also of serious concern. The SPS rules would require the United States to base its food safety standards on international standards. Article 9 of the proposed SPS text states as follows: "[t]o harmonize sanitary and phytosanitary measures on as wide a basis as possible, Members shall base their sanitary and phytosanitary measures on international standards, guidelines or recommendations, where they. * * *"[50]

The use of international standards as a point of departure for U.S. food safety standards is troubling in a number of respects. The principal international food safety standard setting body is Codex Alimentarius. According to a 1992 Congressional Research Service Report, comparing certain Codex Alimentarius and U.S. food safety laws, nearly 20 percent of Codex's standards are lower than the U.S. comparable standard.[51] In real terms, one out of every five apples is bad. The CRS Report also found that differences between the Codex and U.S. standard systems precluded comparison between 61 percent of the Codex and U.S. standards.[52] These differences between the U.S. and international systems are themselves troubling. Unlike U.S. food safety standards, Codex standards are developed without public comment and are not subject to peer review.[53] Moreover, many of the individuals on Codex delegations who actually select the food safety standards are drawn from the regulated industries.[54]

In addition to the requirement to use international SPS standards as a point of departure, the Final Agreement also would require the United States to participate in the Committee on Sanitary and Phytosanitary Measures, which is intended to facilitate harmonization.[55] This Committee is troubling because the Committee's mandate explicitly requires its guidelines to "take into account * * * the exceptional character of human health risks to which people voluntarily expose themselves."[56]

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[45] Agreement on SPS, supra note 17, at art. 21.
[46] Id., at art. 21, note 3.
[47] Id., at art. 21.
[48] Id.
[49] Id., at art. 16.
[50] Id., at art. 9.
[51] Donna Vogt, "CRS Report for Congress: Sanitary and Phytosanitary Measures Pertaining to Food in International Trade Negotiations," Sept. 11, 1992, at 22.
[52] Id.
[53] Compare id., at 18-20 (discussing U.S. standard setting) with id., at 20-22 (discussing Codex standard setting).
[54] Daphne Wysham, "The Codex Connection: Big Business Hijacks GATT," 251 The Nation 770, 770-72 (1990).
[55] Agreement on SPS, supra note 17, at art. 20.
[56] Id.

In other words, in facilitating the harmonization of standards, the Committee is required to weigh the level of risks we voluntarily accept against the levels of risks we chose not to accept. The full ramifications of this provision are unclear. For example, will the Committee balance the level of risk we accept in driving a car or living in an urban center, such as Los Angeles, when harmonizing the level of cancer risk we will accept in our foods? By the provision's own terms it would seem so.

The SPS rules would also limit our ability to inspect the foods coming into our country to ensure their safety. Under the Final Agreement, the information we can require about food products, and our procedures for inspecting and approving such products (both individual items and clashes of items) would have to be "necessary."[57] Here again, the danger is that the term "necessary" in trade jurisprudence generally means least trade restrictive.[58] This provision also would invite trade panels to second guess the food safety inspection and monitoring programs, which if anything need to be stricter.

The potential threat from the TBT and SPS rules to environmental, health and safety laws does not stop at the federal level. The Final Agreement explicitly requires the United States to take measures to ensure that the standards of state and local governments conform with the TBT and SPS rules.[59] These requirements would leave a wide range of state and local environmental, health and safety standards vulnerable to a trade challenge. For example, California's Public Resources Code includes a minimum recycled content requirement for glass beverage and food containers.[60] The European Community has already stated that it believes that this requirement is in violation of the current GATT rules.[61] The Final Agreement's more draconian rules will only serve to strengthen this and other threats to state and local environmental, health and safety laws.

It is important to note as well that the Final Agreement gives no sanctuary to the environmental protections of international environmental agreements such as the Montreal Protocol,[62] the Basel Convention,[63] and the Convention on International Trade in Endangered Species.[64] Although the NAFTA [65] should not serve as the environmental standard by which trade agreements are judged, even the NAFTA attempted to provide heightened protection to these international environmental agreements.[66] Under the Final Agreement, however, these and other international environmental agreements would be exposed to the same threats that would confront national and sub-federal environmental, health and safety laws. Thus, if a trade panel determined that the United States method of implementing the Montreal Protocol was not least trade restrictive, the United States could be found to violate the Final Agreement. The threats here are real. For example, the United States Congress is currently in the process of amending the Resource Conservation and Recovery Act (RCRA) to implement the Basel Convention. One option for implementation now being discussed would ban trade in wastes with all countries except Mexico and Canada, and to allow trade in recyclables only with countries from the Organization for Economic Cooperation and Development. This option would go beyond the specific requirements of the Basel Convention and might be seen as more trade restrictive than other options for implementing the Convention. Thus, this option if implemented could conflict with the Final Agreement.

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[57] Id., at Annex C, art. 1(c), (e).

[58] See, e.g., Thai Cigarettes Case, supra, note 16, at 200-23.

[59] TBT Text, supra note 17, at art. 3.1. ("Members shall take such reasonable measures as may be available to them to ensure compliance by [state and local governments] with the provisions of Article 2); art. 2.2 (setting out least trade restrictive test); Annex 1, art. 7 (defining local government body to include state and local governments); Agreement on SPS, supra note 17, at Annex A, art. 1 (defining SPS measure to include any measure "within the territory of the Member").

[60] See, Cal. Pub. Res. Code § 42310 (Deering 1993).

[61] See, Commission of the European Communities, "Report on United States Trade and Investment Barriers 1993: Problems of Doing Business With the U.S.," 62-63 (1993) ("Therefore the application of [the California minimum recycled glass content requirement] to imported products is not in conformity with GATT rules").

[62] The Montreal Protocol on Substances that Deplete the Ozone Layer, adopted and opened for signature Sept. 16, 1987, entered into force Jan 1, 1989, S. Treaty Doc No. 100-10, 26 I.L.M. 1541.

[63] The Basel Convention on Transboundary Movement of Hazardous Waste and Their Disposal, opened for signature Mar. 22, 1989, U.N. Doc. EP/16.80/3, 28 I.L.M. 649.

[64] The Convention on International Trade in Endangered Species of Wild Flora and Fauna, Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243.

[65] See, NAFTA, supra note 3.

[66] See, NAFTA, supra note 3, at art 104.

Similarly, the United States requires as part of its implementing legislation for the Montreal Protocol the labelling of certain products made with ozone-depleting chlorofluorocarbons.[67] The Protocol, however, does not specifically require parties to adopt a labelling scheme. Thus, the United States' implementation of the Protocol could be seen as more trade restrictive than other possible implementation schemes. Here again, this could place our protections under the Protocol in conflict with the terms of the Final Agreement. Despite the repeated pleas of our trading partners and many U.S. interests that we should attack global environmental problems through multilateral means, the Final Agreement rewards our multilateralism by placing it at risk.

There are those who will argue that although the Final Agreement places environmental standards at risk, the risks are low. They will rightfully claim that a trade panel cannot actually invalidate a U.S. law. They will also claim that the chance of another party challenging a rational U.S. environmental, health or safety law is minimal. Their first claim is misguided, their second is erroneous.

While it is true that a trade panel cannot actually overturn a party's environmental, health or safety laws, under the Final Agreement's new dispute resolution provisions substantial pressure can—be brought to bear on domestic authorities to change their policies and protections. For example, whereas the current GATT allows a defending party to block implementation of a panel decision, the Final Agreement requires consensus of the parties to block a panel decision.[68] The effect of this provision is quite substantial and can be seen by way of comparison to the original Tuna/Dolphin decision.[69] Although Mexico won the Tuna/Dolphin panel decision, recognizing the political and environmental costs at stake, Mexico elected not to pursue adoption of the panel decision. Under the provisions of the Final Agreement no such option would exist; a report of the standing Appellate Body or an unappealed dispute panel report would be adopted automatically unless a consensus of the Dispute Settlement Body rejects the report.[70] Even if both of the parties to a dispute realized that a decision was environmentally or otherwise unsound, they could not block the decision without agreement of all the other parties to the Agreement.

Once a decision has been adopted, the Final Agreement would also increase the power available to the complaining party to induce the losing party to change its practices. For instance, a victorious complaining party would be able to ask the standing Dispute Settlement Body to suspend the application of concessions or obligations granted under the Agreement to the challenged party.[71] If a U.S. standard were to fall victim to the substantive rules discussed above, these new procedures would give other countries tremendous leverage over the United States to change its law.

Moreover, the belief that the Final Agreement's dispute resolution procedures will not be brought to bear on rational U.S. environmental, health and safety laws is not borne out by the facts. In the past three years, other nations have used trade rules to bring challenges against the United States for: (1) the Corporate Average Fuel Economy standards[72]; (2) the Marine Mammal Protection Act[73]; (3) the Toxic Substances Control Act[74]; (4) the Internal Revenue Code's Gas Guzzler Tax[75]; and (5) Puerto Rico's milk safety standards.[76] During this same three year period, challenges have also been threatened against: (1) EPA's reformulated gasoline regulations[77]; (2) California's Safe Drinking and Water Toxic Enforcement Act[78]; (3) the High Seas Driftnet Fisheries Enforcement Act[79]; (4) U.S. regulations on the importation of animals or animal byproducts from areas with Bovine Spongiform

[67] See, 42 U.S.C. §7671j.

[68] Understanding on Dispute Settlement, supra note 5, at art. 16.4.

[69] See, United States—Restrictions on Imports of Tuna, (decided Sept. 3, 1991), DS21/R.

[70] Id., at arts. 16.4, 17.14.

[71] Understanding on Dispute Settlement, supra note 5, at art. 22.2.

[72] Second Submission to the Panel on United States Taxes on Automobiles, supra note 11.

[73] See, Restrictions on Imports of Tuna Case, supra note 22.

[74] See, Brief of Amicus Curiae for the Government of Canada at 16-19, *Corrosion Proof Fittings* v. *EPA*, 947 F.2d 1201(5th Cir. 1991).

[75] See, Second Submission to the Panel on United States Taxes on Automobiles, supra note 11.

[76] See, Final Report of the Panel, In the Matter of Puerto Rico Regulations on the Import, Distribution and Sale of U.H.T. Milk From Quebec, USA-93-1807-01, June 3, 1992.

[77] "Venezuela Asks U.S. for Talks on New Fuel Rules," Reuters, Energy News, Fin. Rep., Jan. 14, 1994 (available on NEMS).

[78] E.C. Report, supra note 61, at 69-70.

[79] "U.S. Senator Murkowski Optimistic About ROC Bid to Enter GATT," Central News Agency, Dec. 4, 1991 (available on NEXIS).

Encephalopathy[80]; (5) EPA's interim tolerance for the pesticide procymidone[81]; (6) USDA's ban on certain virally infected Canadian potatoes[82]; (7) EPA's regulations governing the pesticide ethylene bisdithhiocarbamates[83]; and (8) the Clinton Administration's proposal for a British Thermal Unit (BTU) energy tax.[84] Added together, there have been no less than 13 trade challenges or threatened trade challenges to U.S. environmental, health and safety laws in roughly three years time. The facts are telling. The threat to environmental, health and safety laws here is real and the Final Agreement will only increase this threat.

Finally, the powers accorded under the Final Agreement to the proposed WTO make it difficult at this time to fully assess the potential threat to U.S. environmental, health and safety standards. For example, the WTO would be empowered to make certain changes to the Final Agreement's SPS and TBT rules upon a two-thirds vote of the parties.[85] Under the current BAIT such changes can only be made by a consensus of the parties. Although changes adopted through the WTO procedure would only be effective upon the parties agreeing to them, this provision still makes the Final Agreement's threat to environmental, health and safety laws a moving target. The ability of the parties to change the rules by a two-thirds vote is most troubling in the trade and environment area, where no other nation has shown the same degree of environmental awareness or leadership that the United States has. Simply put, with the WTO it is impossible to know exactly what we are getting ourselves into.

B. The Failure to Provide Safeguards to Ensure Environmental Sustainability

The second part of our sustainability test is that in order to be acceptable the Agreement must include safeguards to ensure that expanded trade will be environmentally sustainable in nature. Regrettably, the Final Agreement also falls short here.

We fear that the Agreement's incentives for increased trade and foreign investment,[86] absent safeguards, could take us backwards, encouraging countries to compete in international markets by lowering or waiving their environmental standards. Although, we did not support the NAFTA, the NAFTA and the environmental supplemental agreement did at least attempt to deal with the issues of environmentally-related investment flight and industrial relocation.[87] In sharp contrast, the Final Agreement makes no such effort. The Agreement fails to provide a mechanism to ensure that nations will not lower or waive their environmental, health, and safety laws to encourage investment. Moreover, whereas the NAFTA supplemental agreement provided a mechanism designed to ensure that the three parties take seriously their environmental commitments, the Final Agreement fails to provide a process to: (1) ensure that parties will enforce their existing environmental, health and safety laws; and (2) encourage the parties to adopt new laws to address pressing environmental, health and safety threats.

In fact, there is only one sustainability safeguard in the entire Final Agreement. Article 8.2(c) of the Final Agreement's Agreement on Subsidies would allow for one-time, non-recurring subsidies designed to assist existing facilities comply with new environmental requirements.[88] However, even this "green" subsidy provision is very limited. The subsidy: (1) could not exceed 20 percent of the cost of the adaptation required; (2) could not be applied to "the cost of replacing and operating the assisted investment * * *;" (3) could not be "directly linked to and proportionate to firm's planned reduction of nuisances and pollution * * *;" (4) could not "cover any manufacturing cost savings which may be achieved;" and, (5) would have to be "available to all firms which adopt the new equipment and/or production process."[89] Given

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[80] E.C. Report, supra note 61, at 58-59.

[81] "EPA Cites Trade Consideration in Granting Interim Procymidone Tolerance," 8 Int'l Trade Rep. (BNA) 652 (1991).

[82] "U.S. Ban on Some Canadian Seed Potatoes Brings Provincial Calls for Retaliation," 8 Int'l Trade Rep. (BNA) 238 (1991).

[83] See, Alan C. Raul & Laurie G. Ballenger, Trade Conflicts Involving Environmental, Health or Safety Standards, June 1, 1993 in Beveridge & Diamond, P.C., International Environmental Law Seminar, June 3, 1993, E, at 15.

[84] See, Clinton Energy Tax Staggers in Senate, Predicasts, May 1993 (available on NEMS).

[85] WTO Agreement, supra, note 18, at art X.3.

[86] Final Agreement, Agreement on Trade-Related Investment, chapter 7.

[87] See, NAFTA, supra note 3, at article 1114.2; North American Agreement on Environmental Cooperation Between the Government of the United States, the Government of Canada and the Government of the United Mexican States, Sept. 13, 1993, at arts. 22-36, 32 I.L.M. 1480, 1490-94 (1993).

[88] Final Agreement, Agreement on Subsidies and Countervailing Measures, chapter 11.13, at art. 8.2(c) (i)-(v).

[89] Id.

these limitations, it is clear that this subsidy provision cannot be relied on as the sole means of ensuring the sustainability of expanded world trade and investment.

The Agreement Establishing the WTO also provides another troubling example of the failure to build adequate safeguards for environmental sustainability into the Final Agreement. Despite the fact that a host of possible safeguards have been suggested for the WTO framework agreement, the only mention of environmental concerns in the WTO Agreement consists of a non-binding preambulatory acknowledgement of the goal of sustainable development.[90]

Nor does the Final Agreement offer us the luxury of looking to some future trade and environment negotiation to provide the safeguards necessary to ensure environmentally sustainable trade. Over the course of the past three years the explicit message from the world trade community has been that it is too late to address the integration of trade and environmental issues in the Uruguay Round; this integration must wait for the promised "Green Round."

The promise of a Green Round, however, may prove illusory. Not only does the Final Agreement fail to commit to a Green Round, but it also fails to earnestly move towards this goal. For example, despite extensive efforts on the part of the United States, the WTO Agreement does not even provide for a Committee on Trade and the Environment, which might have served as a venue for beginning these reform efforts. The United States is still working diligently with other GATT parties to add such a committee,[91] however, the failure of the GATT parties to include such a committee from the outset raises serious questions as to their commitment to democratic and environmental reform.

The parties' failure to commit to a Green Round, and their refusal to create a Trade and Environment Committee, is not a reflection on the efforts of the United States government, and in particular Ambassador Kantor. The burden of these failures must rest squarely upon our recalcitrant trading partners.

While the parties were unwilling to commit to a Green Round or a Trade and Environment Committee, they did agree to develop a "Work Plan" on trade and the environment.[92] We understand that the United States government is now working to expand upon this Work Plan to bring about the desired reforms. Although we strongly support the Administration's initiatives here and will work with the Administration to help them succeed, the Work Plan is not a panacea for the flaws of the Final Agreement.

Moreover, we have serious questions about the Work Plan's ability to advance an environmental reform agenda. First, GATT negotiations are time consuming.[93] For ample, the Uruguay Round required roughly seven years to complete. The Work Plan lacks the immediacy of even a negotiation and so there is no way to predict just how long this process will endure. Moreover, while this time consuming process inches forward our environmental, health and safety laws would remain at risk.

One alternative would have been to reach an agreement on a moratorium to trade challenges to environmental, health and safety laws during the process of the Work Plan. This alternative would not only have insulated environmental laws from challenge, but would have provided some impetus for the parties to negotiate environmental reforms with all deliberate speed. This alternative, however, was not adopted.

Second, many of the problems that need to be addressed through the Work Plan are the result of provisions in the Uruguay Round. The resolve of the parties to turn right around and essentially reopen provisions that were the product of seven years of negotiations must be questioned.

Third, the success from a trade perspective of the Uruguay Round must be attributed in large measure to the wide range of issues included in the Round's package deal; virtually every party had some stake in a successful completion to the Round. If the Final Agreement is signed, sealed and delivered, what inducements will be available to ensure the success of future trade and environment efforts?

Lastly and most importantly, the Work Plan does not even admit to the need for reform. In its most telling provision the Work Plan provides that the "programme of work [shall] make appropriate recommendations on whether any modifications of the provisions of the Multilateral Trading System are required, compatible with the

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[90] WTO Agreement, supra note 3, at preamble.

[91] Such an addition is possible pursuant to article 9 of the Agreement Establishing the WTO. See id., at art. 9.

[92] Trade Negotiations Committee, Trade and Environment: Draft Decision, Dec. 13, 1993, TN. TNC/W/123, UR-93-0196.

[93] In fact, GATT negotiations are so time consuming that some call GATT "the General Agreement to Talk and Talk." GATT Bargaining Goes Down to the Wire, Wall St. J., Mar. 6, 1992, A2.

open, equitable and non-discriminatory nature of the system. * * *"[94] We have already passed the issue of whether reforms are needed. The issue now is what reforms are needed. The Work Plan's failure to reflect this evolution betrays its overall entrenched reluctance to reform the trading system. Given its inherent limitations, the Work Plan cannot be looked to as an environmental justification for the adoption of the Final Agreement.

CONCLUSION

For the past three years the integration of trade and environmental issues has occupied a prominent place on the trade policy agenda. Despite three years of intense efforts, this Congress has before it a Final Agreement that not only fails to make a considered attempt at integrating these two vital areas of public policy, but launches a direct attack on our environmental, health and safety protections. While the failure of the current GATT to address the need for environmental protection can be chalked up to benign neglect—environmental issues were not considered pressing in 1947—no such justification is available for the Final Agreement.

Not too long ago I had the opportunity to hear a senior Administration official make an impassioned plea for the environmental community to support the Uruguay Round so that the Clinton Administration "can stop painting the walls that other Administrations have built and can start building their own trade and environment framework." Unfortunately, the very architecture of the Final Agreement would appear to preclude erecting trade policies that support and do not impede environmental, health and safety protection. As a condition for Congressional approval of the Final Agreement, the Administration must do more than offer a few splashes of green paint. It must articulate a plausible strategy for fostering sustainable development through trade.

Senator KERRY. Thank you very much. Thank you, all of you.

Let me come back quickly, if I can, while the topic is hot. Ken Berlin, what do you think with respect to the criticism that Rob leveled at you on the issue of the least restrictive application?

Mr. BERLIN. Well, I think the least restrictive test is a very bad test. It will, in fact, lead to a attacks on legitimate U.S. environmental laws.

Senator KERRY. Why? How? Run us through that a little bit.

Mr. BERLIN. Well, for example, suppose you have a law, you have a command and control regulation, that says you have to act in a certain way. Theoretically, you could come in and say all you really need here is a label.

Senator KERRY. Is what?

Mr. BERLIN. A label on the product. You do not actually have to regulate the product itself. That is the kind of a tactic you get under these provisions.

Now, I have not really tried to do an analysis, product by product, on this to see where the laws that you have written could be written in a better way than they are. But I kind of worry at times that you do not always write perfect laws up here.

There are some limitations on that, though. And the reason I say the impact of that may not be that bad is—there are several reasons for it. One is the technical regulation provisions only go to product characteristics, so you can only attack a product characteristic under that provision. I do not think, for example, you can use that provision to ever attack anything under the Clean Air Act. But you have to look at it and say there is this regulation of a product characteristic that is more restrictive than necessary. It is not general environmental regulation, it is only product characteristic regulation. That is all that applies to. That is a very, very significant limitation on the provision.

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[94] Draft Decision, supra, note 92.

Then you have to compare the question of would you, if you wanted to attack a U.S. regulation and you are an industry that wanted to attack it, would you normally go to a trade forum or would you look to U.S. domestic law to begin with? You can under our law bring a myriad of challenges to any regulation. Regulations are challenged in court all the time. I think our laws have been very well tested for their completeness and in the way they are written, probably more than the laws of any other country. And I think that most of our laws would probably stand up fine on this.

If you go international, you have got this extra trade-restrictive test, but you have got to deal with the whole international system. The case has to be brought by a nation, not a company. It is going to be very expensive and time-consuming to do it. The company that recommends is not going to know what is happening.

So, I do think that this is an additional arrow in the quiver of somebody that wants to attack a statute, but it is only one of very many arrows, and I am not sure it is the best arrow. Nevertheless, I do not like the test.

Senator KERRY. Do you want to respond to that, Rob?

Mr. HOUSMAN. Briefly. I think Ken is right on many of those points. He has said that it is an arrow. But I can, for example, provide you with an example from the Clean Air Act where I think it is being challenged right now. Venezuela is threatening challenge to our reformulated gasoline baseline requirements. And if the least trade restrictive test was put in there, I would venture to say that they would be victorious. They may be victorious under the current test. But I venture to say that I give a guarantee of a victory under the least trade restrictive.

Senator KERRY. The comment was made earlier about GATT's obsolete status and that the procedures are wrong. As we lay down the parameters for this post-GATT discussion and try to sort ourselves out here, help us to understand what you think the most important principles to lay down are, and second, what are the most difficult areas as we do that going to be?

Mr. HUDSON. I think the first important principle has to do with openness and public participation. We take a lot of things for granted in our society. We are not trying to tell everybody what their exact definition of "democracy" ought to be. But when you are starting with GATT, you are starting with an institution that, like it or not, has an important effect on both international, national, and local laws on environment.

Now, if they are going to necessarily involve themselves in that, then I think the very basic question of openness and public participation is relevant. I will let others go to the other principles, but I would cite that as the first and most important principle. The difficulties in getting that openness are the same difficulties we have with the World Bank and the other international financial institutions. But we have a success story behind us. The Earth Summit in Rio was conducted with a great deal of openness and an explicit recognition of the role of citizen diplomacy. Things are changing around the world. There are emerging democracies.

Senator KERRY. You know, the obvious fear of all of these countries, and they use all kinds of excuses to mask it, is really just cost. It comes down to how this affects the profit line. Is that not

in a way where you come out? If it is too intrusive, if there is too much demanded, it alters the balance in the marketplace.

Mr. BERLIN. I think a lot of the fear is also an access fear. When you deal with developing countries and they look at U.S. law, what they are really saying to us all the time is we are using these laws to deny them access by setting standards they cannot meet or by keeping their products out. I think from a country level, that is the primary motivating factor to begin with.

Senator KERRY. But by denying them access and by keeping them out, we are in effect guaranteeing that our companies or the other people in the status quo are going to continue to sell.

Mr. BERLIN. Sure.

Senator KERRY. If they are not selling, someone else is; right?

Mr. BERLIN. Absolutely.

Senator KERRY. And they know they can do it cheaper. And they want the right to do it cheaper, because they have seen what every other country got to do when they did it cheaper, right? Every other country that has had cheap market access makes a lot of money, sells a lot of products, puts a lot of people to work. So, the issue here is whether or not there is a method of convincing these countries that they do not lose the economic advantage while simultaneously adhering to standards. Is that true or not true? I mean, there is a principle in approaching this.

Mr. SCHORR. Senator Kerry, first, we are looking for a level playing field. That is, no one should be allowed to have comparative advantage on the basis of their ability to externalize environmental costs.

Senator KERRY. But has any developed nation internalized those costs?

Mr. SCHORR. No, that is clearly right. But what I was going to say is that policy asks people to do what they have never done, and particularly asks developing countries to do something—

Senator KERRY. It asks everybody to do it.

Mr. SCHORR. That is right.

Senator KERRY. Query, Mr. Berlin: Is that the first principle, that we now have to ask all nations to come to an agreement to factor environmental costs in? I mean, this is something that has been espoused by economists as the great equalizer in this debate, that if you get people factoring in the cost at the outset and everybody is accepting that, then you are transferring into the cost of products the cost of cleaning up.

Mr. BERLIN. I think that there has to be one overlay on that, again, which is this idea that I mentioned of really bringing about gradual changes. This is a recognized principle in GATT. For example, many tariff reductions are spread out over 5 or 10 years. Change does not necessarily happen the first day. And it is not easy for anybody to incur these costs in one shot.

We have also, to a certain extent in the United States, already incurred those costs. Our companies may have installed pollution control equipment. It may be depreciated already, and we could wind up with a comparative advantage.

Senator KERRY. Let us say you have both the offenders and potential offenders all in one room, and you are about to engage in a serious negotiation to arrive at something. First question: What

is the something? And second question: What is the step by step that you need to agree on to get there?

Mr. BERLIN. One suggestion is, again, to look at what we did in NAFTA where we established that first stage in this process is to try to agree among countries that each country will enforce its own law. So, you start off with the question of not interfering with the sovereignty of a country, because you say if you have got a set of laws in place you have to enforce those particular statutes.

Senator KERRY. And what if they do not have them in place but you want them to?

Mr. BERLIN. Well, the second step, I think, is to start negotiating gradually on how you can implement a set of laws that follow what we did in the United States. We are now, in our Clean Air Act for example or our Clean Water Act, 20 or 25 years in a process of gradually tightening regulations. We have to figure out on an international basis how to encourage people to go in a direction like that over a period of time.

For example, setting a goal of saying 10 years from now, something will happen and agree internationally to do it and to argue that this is important for the country itself in protecting its own citizens and protecting its own environment. Really, they are doing it as much for themselves as they are doing it for us, and we want them to do it any way that makes economic sense for them.

Senator KERRY. Do you also have to agree, all parties, that you are accepting this transfer into your cost of production or cost assessment, the environmental cost or the resource depletion? I mean, is that feasible or is that just too pie in the sky?

Mr. HUDSON. I think there are already efforts underway in general to do that. I would point to subsidies.

Senator KERRY. But no country that is about to develop is going to spontaneously sit there and say, "Hey, here is a great idea. We are going to just add 20 percent to our cost of our products because it is the right environmental thing to do."

Mr. HUDSON. No, but I do not think they are going to take the full hit on internalization. You look at agricultural subsidies and other subsidies. We do not pay market prices for water around here. I think that the hit is not going to be all to the south on this internalization. UNCTAD, the UN Commission on Trade and Development, is looking at pricing mechanisms for internalizing costs that will not result in the South only taking a hit on this. There is going to be a hit, no doubt about it. But I think what is important is also to get the analysis right.

Senator KERRY. What is the leverage here?

Mr. SCHORR. Access. Technology transfer, as well, I think.

Senator KERRY. Does that not run directly counter to what Senator Danforth is worried about?

Mr. HOUSMAN. Actually, I think the leverage is a fear of anarchy, to be quite honest. The system right now is anarchy. Anybody can do anything they want in the environmental area, basically. And to be quite honest, other countries are quite afraid of what we may do on our own, unilaterally, with good reason.

One of the best ways to bring them to the table is to say that a social contract, if you will, is preferable to anarchy. And that is, if you are looking for market access, if you are another country

looking for market access, that predictability, that dependability of negotiated terms, is a major benefit.

Mr. BERLIN. I think there is one other point of leverage, and I actually think it is the only one that will ever work. It is one that we may not be able to afford now, and that is there are going to have to be some resource transfers, transfers of funds to help developing countries meet these requirements. There are a lot of ways to do that.

Senator KERRY. Is that the quid pro quo for the internalization of costs into the products?

Mr. BERLIN. Sure. It is the quid pro quo for the environmental protection, at least, that they are going to institute. I hate to use just internalization of costs.

Senator KERRY. What does that do to the "polluter pays principle"?

Mr. BERLIN. They would still have to pay if they are polluting. I think the distinction is it is the installation of the initial equipment that is very, very expensive. Once that equipment is installed, then people ought to be off on their own, not receiving any kind of help. And some of it may just be, of course, as we are doing in Mexico, infrastructure and projects like that.

Senator KERRY. Now, query: If the United States were suddenly to step up to bat and say we are going to engage in a program of technology transfer to China, and we are going to subsidize GE or EG&G or somebody in their effort to retrofit or to engage in whatever mitigating activity, how do you deal with the issue of unwarranted subsidies to your business? That becomes a trade infraction with respect to competing countries that are not willing to do that.

Mr. BERLIN. I agree it is potentially subject to abuse. I think what was done at GATT, for example, was a reasonable step in that direction. In the GATT Round, in this last agreement, you are now permitted to give a 20-percent subsidy for retrofitting of existing facilities. It is a narrow subsidy, and it cannot apply to actual operation and ongoing costs at the facility.

Senator KERRY. Will the new technology subsidy—not technology—R&D subsidy that has been permitted under the GATT that some Senators have objected to, would that cover that also?

Mr. BERLIN. I am not an expert on the R&D, but I do not think it would cover that. But it might cover some of the development of some of the equipment, obviously, as we go forward. I think this is a complicated question about how you go about and do this funding. But we have to recognize that it is going to be a very expensive process for some countries. And we are, to some extent, going to benefit economically in the long run by their coming up to our standards and achieving a level playing field.

And again, I am not saying we should even do this unilaterally. There are a lot of multilateral ways to do it.

Senator KERRY. You defined the resistance in Geneva. Could you be more specific? What is the foundation of that resistance?

Mr. SCHORR. I think to some degree it is feared that Senator Danforth may be right. I do not think those fears are well-founded, but his remarks sound very much like the remarks of some of the delegations at the GATT, the fear of closing down.

Senator KERRY. Is there an offer, or a gambit that somehow calms those fears, or addresses them?

Mr. SCHORR. Well, I think two things need to be pointed out. The first is that we are on GATT's turf here. The history since World War II is that market liberalization has made extraordinary strides, while international cooperation on environmental concerns has lagged significantly further behind.

The notion that environmentalists are going to be able to shut down the international trading system is to give environmentalists a degree of power that environmentalists would greatly enjoy. I do not think that these are reasonably based fears.

Senator KERRY. Well, why do you say they are not reasonably based? It depends. When you talk about environmentalists, you have got a broad range of reasonableness, frankly.

Mr. SCHORR. That brings the second point. The second thing I was going to say is that I think that by bringing environmentalists into the process, by encouraging trade negotiators to see environmentalists as experts in a technical field who can contribute to distinguishing between disguised barriers to trade and real environmental protections, we can get back to the science that is the basis for all conservation efforts.

Senator KERRY. So, does there have be a broadly accepted standard with respect to science?

Mr. SCHORR. There does not have to be a broadly accepted standard at this stage with respect to science. There has to be a recognition that science continues to develop and involves uncertainties. There also has to be a recognition that values are always in play. Therefore, you look for methods to weed out the cynical abuses while allowing differing levels of value and differing opinions on sound science.

Senator KERRY. What do you do in terms of any cultural uniqueness exemptions or distinctions? Japanese claims on the whale, or the Norwegian fishing village history—I mean, this gets into the whole issue of, obviously, some people are against any kind of takings of marine mammals, others who feel that there is a legitimate balance, et cetera. But do you begin to consider some kind of cultural distinctions here, or does the broader interest somehow wipe those out, or have a right to?

Mr. HUDSON. How you deal with those I think is going to be the subject of what is going to be negotiated under this work program. I do not think there is a recipe now. We understand that moral values are involved. I think it is emotions. I think it is moral values.

Senator KERRY. Do you envision a work program that would legitimately entertain that concept, conceivably?

Mr. HUDSON. Well, it does seem like a brave, new world, or a Star Trek episode, but this is what we are going to have to deal with, is how we resolve these differences in values in a way that relates to international commerce.

I wanted to go back to your question about what is it, or how do we respond to the fears, legitimate fears that these other governments have? First of all, they do not really know who we are. Remember that these are the first couple of times any of them has ever met with an environmentalist, or an environmental group on these issues, and we found it very effective to take that time. We

have a person in Geneva now, going over and meeting with people. That helps.

The second thing is to understand the history, political history in the United States. Much to the chagrin of some of our colleagues in the environmental movement, there were groups who endorsed NAFTA and paid a price for doing so, but it was the right thing that we, at least the National Wildlife Federation and other groups, thought should be done.

So, reminding them of what happened to NAFTA is an important thing as well, and I think they understand that what we are dealing with is an inevitability. The rules are going to change, the very markets are going to change, and what we are doing is bringing those rules up to speed with the emerging markets.

Senator KERRY. You just segued me into a question I wanted to ask about the distinctions between these agreements and NAFTA, which won the support of the National Wildlife Federation and the World Wildlife Fund.

Now we are hearing arguments from you that sound very similar to the arguments of Sierra Club and others who opposed NAFTA with respect to the secrecy of the GATT panels and so forth.

What are the differences within the two agreements that lead you now to oppose Uruguay Round despite the support for NAFTA?

Mr. HUDSON. Well, first of all, they are very different agreements with very different time schedules, as you know. I would say the list of what is different about NAFTA is a long one. The investment provisions are a good example. The North American Commission on Environment, to deal on into the future with these issues, a number of other openings for public participation—I mean, there is a long list of the good things that were done in NAFTA, to the credit of the governments involved.

Senator KERRY. So, in a sense that is a signal to people who are sitting there in fear and trepidation that there really is a reasonableness here, that you are not talking about either a double standard or some impossible standard, but rather, you are saying, look at NAFTA for what it represents as an example of a level of reasonableness that can be achieved. Is that fair?

Mr. HUDSON. Yes. Just to add one other thing here, I think it is ironic that those who fear environmentalists seem to believe that there is this gigantic constituency out there for liberalized trade. There just is not. It is a very fragile constituency, and as you said, what NAFTA demonstrates is that people can work together, craft things that address environmental issues, and enjoy the support of a constituency, and they conveniently ignore that when this issue is raised.

Mr. SCHORR. Senator, if I may, I think there is a question of responsibility here. There is a question of the responsibility of the trading system to recognize that it has environmental impacts, and to put structures in place that help them deal with those impacts, but equally there is a responsibility on environmentalists, a responsibility that we have now raised. We will be working very hard at at the World Wildlife Fund to go out and demonstrate empirically how trade hurts the environment, and how we can help adjust to those injuries.

That brings me back to what I said before. By bringing the dialog into existence, responsible studies and responsible analysis will help calm the fears of the trade movement.

Senator KERRY. Ken, on your article you suggested what has been recently suggested in Europe, which is a tax worldwide on goods in order to raise some money for this fund. I think it is a .25-percent tax on the import of all goods, et cetera.

If you did that, first of all, would you be designating a portion of the current custom level to go to that, or would this be an add-on?

Mr. BERLIN. Well, obviously, you could do it either way, but certainly our proposal probably would be that you would do it from current revenue. We are talking hopefully about a small enough percentage of the revenue so that there would not be too much to make up.

Senator KERRY. Yes, because this is on the imported goods.

Mr. BERLIN. Right.

Senator KERRY. Is it therefore deemed to be a polluter pays tax, because in effect it is coming from the very entities that produce these things and created the problem, or is it outside of the polluter pays principle, because it is coming from not a targeted specific entity, and therefore, do we run into a real problem in undermining that concept?

Mr. BERLIN. I do not think it is the polluter pays principle per se, because it is not targeted enough to deal with pollution itself. It is just a way of raising funds.

Senator KERRY. A way of raising serious money to begin to deal with the problem on a broad-based fashion.

Mr. BERLIN. The critical distinction between here and NAFTA is that I think a worldwide tax like that would not be trade-distortive. There was a reasonable argument to make that a border trade in NAFTA is trade-distortive, because it only involves three countries.

Can I—I think it is also important to point out, because I am not sure this is how everyone views where the tax goes. Our version as to where that tax goes is to countries, the poorest countries in the world that have trouble enforcing basic enforcement capacity, and what you are trying to do there is to establish the conditions under which there is not a distortion in the marketplace toward countries that do not enforce their own laws.

The other reason we did this, of course, is to get business support for this idea.

Senator KERRY. We have this international parliamentarians meeting coming up in which we will be talking about this subject clearly with Japanese, Europeans, Russians. What is the most important message on which they could join together? What is the most important leverage or issue that you think they should try to unify around, if any? Anybody want to take a shot at that?

Mr. HOUSMAN. I think it is the democratization of the trade system, opening up panels, opening up the processes. Democracy is kind of like the flu that is going around Washington right now. Once it strikes it spreads quickly, and it touches everybody.

The fear about democracy is that it will spread.

Senator KERRY. I thought it was the Beijing flu.

Mr. HOUSMAN. It may be quite one and the same.

Democracy has two aspects to it: one, if we are committed to democracy spreading around the world by giving an international forum where democracy is the rule, not the exception, countries that typically deny their citizens participatory rights will find it more and more difficult to deny them domestically participatory rights they enjoy under other circumstances internationally.

Moreover, as you recognize from the outset, you do not find environmental protections where there are authoritarian or fascist or other forms of systems that deny their citizens rights. You just do not find environmental protections there.

One of the strongest things we can do to the trading system is open up the windows and let the sun shine in.

Mr. BERLIN. One other, on an even, perhaps just as basic level, I think there still needs to be agreement between nations, and in the United States, that there is a need to put some sort of an overlay over the trading system to ensure that the benefits of free trade are not lost by causing harm to the environment and by causing nonsustainable growth and development, and that can be done carefully and reasonably thoughtfully, but there is a need for some sort of effect of rules that protects against the negative impacts of trade and ensures that the benefits continue.

Senator KERRY. Would you be willing to work with us a little bit in sort of thinking that out in the next couple of weeks?

Mr. BERLIN. I would be very happy to.

Senator KERRY. That would be terrific.

Mr. SCHORR. That is more or less exactly what I would say. The crossroads where we find ourselves in Geneva is the crossroads in the question, do we really have a problem here, and does the GATT system have to respond?

We have a work program on the table. We are on the agenda. For many delegations, we are on the agenda as a political fact, and not because they really see a need to move forward on this issue. I think that a multilateral declaration by interested politicians that yes, a problem exists, yes, it is an inevitable problem, and yes, the GATT system must respond to it through reform, would be extremely useful.

Mr. HUDSON. And I would just add, to build on a point that Rob Housman made earlier, I think what we want to avoid is anarchy, and what is out there is pretty anarchic. Recognizing that the global economy will change to be more sustainable, that is something that is inevitable.

The best way to deal with that is to move together as a community of nations, and that, I think, is perhaps the most convincing argument to these governments. This is going to happen whether they like it or not. Do they want us to do this unilaterally? We are saying we want to negotiate this and move together on it. That is what we are offering them, and I think that is a pretty good deal.

Senator KERRY. I think that is a good note to wrap up on today. As I said earlier, we are scratching the surface of some very complex relationships and issues. It is going to take a lot of leadership. I hope our country is going to offer it, because I think that it is clear if we do not, it is not going to happen.

It will be a very sloppy, anarchic process that drags on for a while until everybody is forced into that ultimate confrontation which is going to come, but it would be good if we could lead, and pressure, and help push it along and avoid some of the downsides in the near term, and I hope we are going to do that, and this is just the beginning of our effort to try to think it out somewhat and to watch what the administration is doing and to help push the administration to a good approach on it.

I am going to circulate this record to other interested colleagues within the Senate who follow this issue. If you have further thoughts on it, please be in touch with us and our staff, and we will continue, obviously, to be in touch with you.

I thank you very much for your help and patience today. We are adjourned. Thank you.

I am going to leave the record open for additional comments for another 3 weeks for questions for colleagues and otherwise. Thank you. We stand adjourned.

[Whereupon, at 12:52 p.m., the subcommittee adjourned.]

APPENDIX

PREPARED STATEMENT OF ANDREA DURBIN, TRADE POLICY ANALYST, FRIENDS OF THE EARTH, UNITED STATES

I am Andrea Durbin, Trade Policy Analyst for Friends of the Earth, USA. Founded in 1969, Friends of the Earth is an international environmental organization, with affiliated groups in 52 countries around the world.

We appreciate the opportunity to appear before the committee today to provide an environmental analysis of the Final Agreement of the Uruguay Round of GATT.

The environmental community is unanimous in its criticism of the environmental problems in the GATT agreement, and the failure of the negotiators to even meet the standard of what was achieved in the NAFTA for the environment. If adopted as presently negotiated, this GATT would be a step back from the progress made in NAFTA, as well as pose serious risks to global environmental protection and decisionmaking.

Based on our commitment to environmental protection, Friends of the Earth-US is opposing the Final Agreement of GATT and we urge Congress to fully consider its environmental ramifications. Furthermore, we urge Congress to insist on environmental provisions and a comprehensive work program for the newly created World Trade Organizations before voting on the Agreement.

Friends of the Earth's decision to oppose the GATT should not be seen as being against trade. We are however making a judgment about how the Final Agreement will impact the environment and what needs to be done in order to make liberalized trade protect the global environment and become environmentally sustainable. The assumption that more trade will lead to wealth, and therefore an improved well-being for all, must no longer go unchallenged. Perhaps it is time to recognize that free trade, in its purest form, may not serve our goals of improving the quality of life for present and future generations to come. In fact, these principles may be harming our progress toward that goal.

In evaluating the effects of the Final Agreement on the environment, we have looked at four areas:

1. Whether or not the GATT rules protect a country's right to set environmental standards higher than international standards, so long as they are applied equally and not with the intention of impeding trade;
2. Whether or not the GATT will promote trade that protects the environment, conserves natural resources and leads to environmentally sustainable development;
3. Whether or not the GATT rules will allow for openness, transparency and environmental representation in its decision making processes;
4. Whether or not the World Trade Organization (WTO) will have a strong environmental mandate, environmental directives and a plan of operation focused on resolving broader trade and environmental issues.

As of today, the Final Agreement of GATT fails to provide adequate environmental safeguards in each of these areas.

RISKS TO U.S. ENVIRONMENTAL, HEALTH AND SAFETY STANDARDS

The Final Agreement of GATT sets forth language and criteria that will allow our trading partners to file a complaint against a U.S. environmental law, forcing a judgment of whether or not that law meets the requirements of the GATT or if it is a "non-tariff trade barrier".

Regrettably, the criteria that will be used to judge an environmental law or standard is unnecessarily narrow, favoring the principles of free trade rather than environmental principles. The flawed language could result in legitimate environmental and health laws being challenged and possibly found to be inconsistent with current GATT rules.

If a law is found to be contrary to the terms of the GATT, the offending country will be required to change its law to adapt to the panel's ruling, or face penalties.

Because of political and economic pressures, such a ruling would put tremendous pressure on the U.S. to conform with the GATT ruling and change the law. A country that refuses to conform with a GATT ruling and maintains its contested law could be forced to pay compensatory measures or face sanctions.[1]

The environmental community is concerned about onerous requirements that environmental standards must meet for GATT, such as the necessity that economic risk assessments be done or that laws are based on scientific principles, when not every law passed is based on these criteria.[2]

Another biased requirement is that a law not be "more trade restrictive than necessary".[3] While this kind of requirement may work for standards regulating commerce, it is not always possible or desirable to institute the least trade restrictive environmental standard and achieve equivalent environmental protection, The GATT rule does not recognize other factors about why a particular law was instituted as opposed to another, such as the political or economic feasibility of passing a different version.

The likelihood of countries targeting U.S. environmental laws for future disputes is great. Already, the U.S. is defending three environmental laws that are being challenged in GATT by the European Union: the Corporate Average Fuel Economy Standards (CAFE) for automobile fleets, the Gas Guzzler Tax on inefficient cars and the Marine Mammal Protection Act. The decisions on all three of these cases should be released in the next few months.

However, these are not the only cases expected. The European Union has also complained about other laws, including the High Seas Driftnet Act and California's Safe Drinking and Water Toxic Enforcement Act. Criticism of California's state law raises the question of whether or not state and local laws are safe from the rules of GATT. But the Final Agreement explicitly states that the Members of the GATT must take measures to ensure that the standards of state and local governments conform with the standards set forth in the GATT, on Sanitary and Phytosanitary Measures and Technical Barriers to Trade,[4] meaning that state and local laws are susceptible to challenge.

Language problems embodied in the GATT should raise many flags in lawmakers minds as they consider approval of the Final Agreement. We urge Congress and the Administration to seek a moratorium on any challenges to U.S. federal, state or local environmental or health-based law until acceptable criteria can be negotiated and approved that support environmental goals. President Clinton has already said he will seek resolution to these problems by pushing for a Green Round of GATT. Until that time, U.S. environmental laws, which have been passed and adopted in a democratic process, should not be open for attack in a separate forum by our trading partners.

SUSTAINABLE DEVELOPMENT AND GLOBAL TRADE RULES AT ODDS

The objective of the seven years of global trade talks was to liberalize international trade rules, but the process proceeded with minimal regard for its environment consequences. During the same time, the U.S. participated at the Earth Summit in Rio and committed itself to adopting policies that will lead to more sustainable development.

It is clear that neither of these two goals, free trade and sustainable development, were reconciled in the negotiation process for the GATT. Instead, we have an agreement which directly conflicts with the goals of sustainable development and will exacerbate environmental problems worldwide it is our hope that the two paths can finally converge because the establishment of sound trade rules is crucial for achieving development that is more sustainable and equitable, environmentally and socially.

Many of the direct impacts of the GATT are largely unknown because a comprehensive environmental impact statement (EIS) has not been undertaken by the Administration, as the National Environmental Policy Act (NEPA) requires for any major federal action. An EIS would provide Congress and the American public with

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[1] Dispute Settlement Understanding, article 22.

[2] Agreement on Sanitary and Phytosanitary Measures, article 16.

[3] Agreement on Technical Barriers to Trade, article 2.2. In SPS, but not in TBT, the U.S. negotiators were able to get the parties to clarify the "not more trade restrictive than required", by footnoting article 21, note 3 that "a measure is not more trade restrictive than required unless there is another measure, reasonably available taking into account technical and economic feasibility, that achieves the appropriate level of protection and is significantly less restrictive to trade". Despite the clarification, the environmental concerns remain.

[4] SPS annex 1, article 1 and TBT article 3.1.

critical information about the full impacts of such an agreement on the environment.

But perhaps more importantly, if undertaken in accordance with NEPA procedures, an EIS would analyze the environmental impacts from the outset, and help policy makers and negotiators determine alternative proposals that can mitigate or prevent potential problems. This would allow decision makers to identify and adopt the least environmentally harmful way to engage in trade.

Since it appears that opening up markets and negotiating trade agreements with other countries has become a fundamental part of the Administration's economic and foreign policy platform, it should complete environmental analyses of trade agreements from the outset of negotiations, so that the information can be incorporate in the negotiations. As soon as the Administration announces its decision to begin negotiations with Chile to loin the NAFTA, it should immediately begin the process of drafting an environmental impact statement.

We urge Members of Congress to make it known that this information is critical for Congress' full understanding of the range of impacts trade agreements might have on the environment. We believe that Congress and the American public are entitled to the complete information.

A comprehensive environmental analyses would document how the new multilateral trade rules will affect a number of areas, including investment decisions and locations, the rate of natural resource exports and changes in other industrial and agricultural practices. All of these areas are critical to investigate further because they go to the heart of this question: how can trade rules be more environmentally and socially sustainable?

Investment

In the eyes of economists, a major accomplishment of the Uruguay Round of GATT was to liberalize the rules for foreign investment. These new rules will lead to increased investment, but they do not guarantee that those investments will be sound environmentally, or that they will not further contribute to environmental problems. The Agreement on Trade Related Investment Measures is silent on the issue of establishing environmental requirements for investors.

While the evidence is not conclusive that companies base an investment decision on lax environmental laws or enforcement, it is confirmed that there is a strong temptation to avoid environmental compliance in countries with a weaker environmental enforcement structure.[5] Studies have also shown that industrial flight or migration is more likely where environmental costs for certain industries that face higher environmental costs for investment in technologies or compliance measures.[6]

The debate around NAFTA highlighted how maquiladora industries have violated and continue to violate Mexican and U.S. environmental laws. A study of those industries found that companies increased their profit margin by 100 percent when they did not comply with the environmental requirements.[7] Thus, there is a strong economic incentive for companies to violate environmental laws when they are not held directly accountable for their violations. The result may be higher profits for industry, but at a high cost of more pollution and environmental problems elsewhere.

The investment rules in GATT do not require that investors meet certain environmental standards or provide the community and public with information about pollutants or emissions from the operations. Neither are there requirements that countries cannot lower or deviate from their environmental laws or enforcement in order to attract investment. At a time when countries, particularly developing countries1 are struggling to attract investment to earn revenue and provide employment, it is conceivable that countries will choose to weaken or avoid instituting environmental standards to provide jobs. The unintended environmental effect of the GATT will be to provide incentives for polluting operations to relocate to areas with lower environmental standards, creating pollution havens in other countries.

A second effect is that competing industries operating in the U.S. which abide by U.S. environmental laws, will suffer competitively. If their competition avoids paying the same environmental costs it must pay, the competitor will gain a competitive advantage. This puts the company in the U.S. in a difficult position. It may choose to move its operations outside the U.S., or to put pressure on Congress and the Administration to reduce the environmental requirements it must meet so that it can compete more effectively.

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[5] Friends of the Earth study, "Standards Down, Profits Up", January, 1993.

[6] Summary Report of the Workshop on Environmental Policies and Industrial Competitiveness, January 28-29, 1993, OECD, pg. 7.

[7] FOE Study, "Standards Down, Profits Up", January 1993.

The investment rules in GATT completely ignore the environmental impacts of investment decisions. Furthermore, they permit trade that will allow competitive advantages to be gained at the expense of environmental costs being externalized and avoided.

Natural Resource Use and Production Methods

Many of the parties to GATT are dependent on the export of natural resources. The Final Agreement will increase the exchange of goods between countries, including natural resource exports, but there is no discussion or regard for how those resources are extracted, at what rate and at what impact to either the national or global environment.

According to the way growth is currently measured, if a country cuts down all of its trees and exports them, it will appear as an increase in the Gross Domestic Product. The accounting mechanism does not factor in the loss of the forest resources, the effects of soil erosion, the loss of habitat and biological diversity or the adverse impacts on climate.

The short-sightedness of the conventional accounting mechanism and existing trade rules is obvious, which is why Congress has taken steps to get the World Bank and the International Monetary Fund to develop new ways to measure economic growth and performance. It is inconceivable that a country should be rewarded economically for clearcutting its forests for export, but that is exactly what the Final Agreement of GATT does. Countries are encouraged to export more, but there are no guidelines to promote more sustainable practices or harvesting methods, nor are there incentives to adopt these methods because the trade rules are encouraging countries to increase exports and to export more quickly, not to slow their exports and extract resources at a more sustainable rate and in more sustainable ways.

As a result of the export oriented economic model that has been promoted by the World Bank and International Monetary Fund, Ghana, for instance, is rapidly being transformed into a net timber importing country, despite once having a substantial forest cover. Because Ghana was so heavily dependent on the export of timber, its forests have been devastated. The push for exports led to logging practices which caused significant environmental problems, such as the degradation of land, leading to soil erosion, and its impact on water quality and wildlife, but none of these costs have been quanitied when determining its annual growth rate.[8]

In fact, the current rules do not even encourage countries to take measures to protect natural resources. GATT precedence prohibits countries from adopting policies that will affect other countries resource practices. The GATT rules do not allow a country to restrict imports that are harvested or produced in an environmentally harmful manner.

The precedence was set in 1992. It was then that a GATT panel ruled that the U.S. ban on tuna from Mexico was contrary to GATT rules because it was a ban on the way in which the tuna was being harvested (by killing too many dolphins) rather than on the safety of the tuna itself. With that ruling, the GATT established a precedent that countries cannot base import decisions on how a product is produced. But many environmental issues are related to how a product is produced, such as whether or not toxics are released into the atmosphere, wildlife are killed or forest systems are destroyed.

If we are ever to be successful in setting trade rules that will lead countries to adopt a more sustainable path of development, process and production methods will have to be recognized as legitimate measures to restrict imports, and countries will be allowed and encouraged to adopt them.

GATT LACKS BASIC PRINCIPLES: PARTICIPATION AND TRANSPARENCY

In the State of the Union address, President Clinton stated that commitment to democratic principles is important criterion for evaluating our trading relationships.

We believe that trade agreements should recognize those same principles. Trade agreements should be transparent and allow for public participation in developing policies, decision-making, interpretation and dispute resolution. The Final Agreement of GATT fails to recognize and abide by those very basic democratic principles the President deemed so important.

It is now agreed that international trade rules and the environment are interrelated in many ways. Thus, it is critical that environmental non-governmental organizations and the public are allowed to participate in the decision making process

[8] Report by Friends of the Earth-UK and Friends of the Earth-Ghana, 1993.

on trade agreements in order to make the process more representative and fair, and to address the connections directly.

The Final Agreement of GATT maintains the previously closed process of dispute resolution and decision making. Meetings are closed and there is no public record or notification of the meetings.[9] There is no requirement that the panel decisions and final reports must be released publicly. Parties can release "nonconfidential" information if they so choose, but it is not required.[10] Although the United States Trade Representative's Office has improved its practice of sharing documents with U.S. NGOs, other countries are not following their lead. Access to information is one of the most basic principles of democracy.

A second democratic principle is fair representation. if a dispute panel is established to decide an environmental case, currently there is no requirement that environmental experts serve on the panel. Panels are allowed, but not required, to seek advice from experts on a "scientific or technical matter,"[11] but the panel itself does not need to represent a full range of views, which would include environmental experts in environmental cases.[12] NQOs have no guaranteed access to these panels.

Without full and fair representation of views, trade experts that have traditionally served on these panels will continue to represent the Parties,[13] despite their lack of the environmental expertise that should be required to present a fair case when an environmental law or standard is in question.

WORLD TRADE ORGANIZATION: BLIND TO ENVIRONMENTAL GOALS

The Uruguay Round of GATT establishes a World Trade Organization (WTO) which will Serve to strengthen and further develop global trade rules. Along the same lines of the World Bank and the International Monetary Fund, the WTO will be a multilateral institution that sets and enforces international trade rules.

Friends of the Earth does not disagree with the need for a stronger multilateral arrangement to regulate world trade, so long as that arrangement facilitates the evolution of the trading regime to become environmentally and socially sustainable,

From an environmental perspective, the current formation of the WTO and its draft work program does not even begin to address the interconnectedness of the issues, nor does it set forth a comprehensive plan to resolve some of the conflicts countries have regarding differing levels of environmental protection.

The WTO could be the forum where many of the questions and problems Friends of the Earth and other environmental organizations have raised before the committee today are addressed.

However, it will not be such a forum unless amendments are made to the draft work program and deadlines set. We urge Congress not to let this issue go by and be left to chance and the political wills of other countries. It is absolutely necessary that the WTO encompass a strong environmental platform and directives for a permanent committee to begin to resolve some of the conflicts.

Much of the resistance to such a position and the establishment of a permanent committee on trade and environment issues is emanating from developing countries, who are concerned that these policies will restrict market access. The WTO should address broad areas of concern of industrialized and developing countries, with the goal of making trade rules truly sustainable.

At the conclusion of the December talks, the GATT members agreed to draw up a plan to address environmental issues. A work program and an institution for the program's execution will be presented for adoption no later than the Ministerial Conference meeting in April, 1994.

To contribute to that process, Friends of the Earth is developing recommendations that should be considered and adopted at the Ministerial Meeting this spring. Our initial recommendations are attached to this testimony.

The success of implementing environmental safeguards in Final Agreement of GATT is critical to how trade and environment issues will be resolved. We strongly urge Members of Congress to raise the level of debate and the imperativeness of instituting rules that protect the global environment it is critical that Congress oversee this process, pay attention to the development of the work program and set expectations for what should be achieved at the April Ministerial Meeting. Further-

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[9] Dispute Settlement Understanding, article 14.

[10] Dispute Settlement Understanding, article 18.2

[11] Dispute Settlement Understanding, article 13.2.

[12] Dispute Settlement Understanding, article 8.

[13] Dispute Settlement Understanding, article 8.1. The requirements include "persons who have served on or presented a case to a panel, served as a representative of an MTO Member or of a contracting party to the GATT 1947, * * * taught or published on international trade law or policy, or served as a senior trade policy official of a Member."

more, Congress should fully understand the environmental ramifications of this Agreement before it votes.

FRIENDS OF THE EARTH-US RECOMMENDATIONS FOR ENVIRONMENTAL AMENDMENTS TO THE WORLD TRADE ORGANIZATION

Preambular Language of the WTO:

- Recognizing the inter-relationships between international trade policy, ecologically sustainable and socially just development, poverty eradication and environmental protection;
- Recognizing the need to establish international trade rules that will promote environmental protection, the conservation of natural resources and sustainable development;
- Recognizing the need to take a precautionary approach at all times;
- Recognizing the precedence of existing and future international environmental agreements containing multilaterally agreed trade-related provisions;

Structure of the WTO:

- The Ministerial Conference shall establish a permanent Committee on Trade and the Environment to examine and resolve trade and environment conflicts, with the objective of setting forth trade rules that recognize the goals of environmental protection and sustainable development, and the right of each country right to adopt strong policies to protect their environment and the global commons, including standards that are more stringent than international standards;
- The Committee on Trade and the Environment shall be made up of environmental representatives from each Member of the WTO. The Committee shall meet as necessary to carry out its functions;
- An independent panel of environmental experts will be established to provide advice to the Committee on Trade and the Environment;
- The Committee on Trade and the Environment will operate in a transparent and open process, by holding open meetings, providing adequate notice for meetings and policy decisions, allowing the public and non-governmental organizations to submit comment and monitor negotiations, and by releasing all documents and reports to the public;
- The Committee on Trade and the Environment will consult regularly with the United Nations Environment Program and the United Nations Commission on Sustainable Development to develop and seek the most environmentally beneficially and sustainable trade policies;

The Work Program of the Committee on Trade and the Environment should include:

- Develop a process for environmental analyses of trade rules to be conducted as rules are negotiated;
- Establish environmental guidelines for investment rules, which would include establishing international environmental standards for investors to meet, require that countries not lower or derogate from their environmental laws to attract investment and provide the public and communities with full information about the investment operations and its environmental and health impact;
- Agree that each country will recognize a moratorium on challenges to domestic environmental, health or safety laws until the Committee negotiates new criteria for such standards to meet;
- Establish rules for the process and production methods;
- Promote trade rules which recognize the importance and value in the conservation, protection and efficient use of natural resources and energy;
- Develop an ecologically adjusted pricing mechanism so that goods and products become more reflective of their full environmental cost in the market, including the energy costs of transporting products and the impacts of increased transportation on air and water quality;
- Develop a "green" tax on all traded goods that will be transferred to developing countries that have difficulty meeting the requirements set forth, or that need additional assistance to develop environmental standards and enforcement structures;
- Actively promote increased environmental cooperation globally, the transfer of technology and resources and develop compensatory financing mechanisms for developing countries to raise environmental standards;
- Together with the World Bank and the International Monetary Fund, examine the environmental and social impacts of structural adjustment policies in developing countries and identify ways to ease their negative effects. Such policies encourage the export of products, particularly natural resources, to earn foreign exchange;

- Address the debt problems of developing countries which constrain countries from establishing environmental laws and structures to ensure enforcement, and increase their dependence on the export of natural resources, by working with the World Bank and the International Monetary Fund to evaluate the environmental impacts and lessen the debt burdens of developing countries;
- Establish criteria that preserves the right of each Member to use unilateral trade measures to protect the environment;
- Evaluate how GATT's agricultural policies impact sustainable agriculture practices and rural communities, and develop recommendations that will lead to more sustainable agricultural practices worldwide, including examining how subsidies in industrialized countries affect farmers in developing countries;
- Examine how intellectual property rights rules will affect the preservation and conservation of biological resources, including its impact on the Biodiversity Convention. Develop policies that will ensure that biological resources are protected and that the rights of indigenous people and knowledge is recognized. Address how liberalized trade rules may increase the trade in illegal wildlife and plant species, or allow for the introduction of exotic species into non-native habitats.

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